Dividing Lines between the European Union and Its Member States – Assessing the Impact of the Constitutional Treaty

Scheidslijnen tussen de Europese Unie en haar lidstaten Beoordeling van de impact van het grondwettelijk verdrag

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AUTHOR'S PREFACE

In my professional activities relating to Europe during the past 30 years, including teaching, law practice and government service, I have often discussed with European friends what it means to be a European, and how that compares to being Dutch, Czech, Italian, etc. Invariably these conversations turn to deeper levels of identity, loyalty and political expectations. The EU and European integration are always swirling around these conversations, and it is clear that none of my acquaintances ever expects to lose his or her nationality, even in a highly integrated Europe. There are some lines, such as loss of one's language or culture, that nobody – even today's students who are possessed of a strong sense of European-ness – wants to cross. But what about significant loss of political power at the national level? Before the EU Constitution, such a prospect surfaced occasionally, especially at key moments of integration such as institution of the euro. However, most Europeans continued (and still continue) to view the Union as an undertaking of sovereign nations.

The Constitution and its aftermath have renewed public interest in the overall course of European integration, and it is widely felt that the Convention on the Future of Europe proposed something more than just another treaty amendment. Many Europeans believed that the Constitution represented a major change in the landscape – change was ultimately unacceptable in the form proposed. The discussions raised by the Constitution have inspired the theme of this treatise: What are the existing dividing lines in the EU system, and how might the Constitution have caused them to shift? Doubts over the Constitution's ratification never deterred the many scholars who analysed the document, and in the Introduction I address why the demise of the Constitution has not discouraged my own efforts.

In the process of preparing this text, I have drawn upon three articles that I have written during the past several years. The first, titled "The Proposed European Union Constitution: Will it Eliminate the EU's Democratic Deficit?" was published at 10 Columbia Journal of European Law 173 (2004). Portions of this article are the basis for Chapters 1 and 9 of this treatise. The second is entitled "How the New European Union Constitution Will Allocate Power between the EU and its Member States – a Textual Analysis," and it was published at 37 Vanderbilt Journal of Transnational Law 993 (2004). This work provided a conceptual framework and outline for parts Two and Three of the text. The third piece, "Worth Doing Well – The Improvable European Union Constitution," appeared at 26 Michigan Journal

of International Law 587 (2005), and it is reflected in Chapters 2, 3 and 18. Each journal has kindly consented to my re-use of the relevant material.

Work on this project has taken place at the University of Oregon School of Law, in Slovakia at the Comenius University Institute of International Relations and Approximation of Law, at the University of Tennessee College of Law and at my current professional home, the Creighton University School of Law. I would like to thank the administrators of those institutions for their support in this work, which came in the form of research grants, administrative assistance and unquestioning encouragement. Particular gratitude is extended to Dean Margaret L. Paris at Oregon, who urged me to start down this path, and Deans Patrick J. Borchers and Marianne Culhane at Creighton, who supported the final stages of the research and writing. I would also like to acknowledge and thank those law students who have provided research assistance at various times, with special recognition to Stefanie van der Laan for translating the Dutch language summary found at the end of the treatise.

My deepest appreciation goes to Prof. Dr. Jaap W. de Zwaan of the Faculty of Law at Erasmus University of Rotterdam, also currently Director of the Clingendael Institute in The Hague. He has served as mentor, colleague, editor and friend during the past four years, and without his patient support and persistent attention to detail, this treatise would not have come into being. I have learned so much from Jaap and he has contributed so much to this effort, that merely saying thanks seems like very little consideration in return. But thanks nevertheless.

Finally, I would like to dedicate this treatise to the following people:

To my parents, Steve and Lois,
for a lifetime of intellectual example and inspiration

To my wife, Carmelicia,
for supporting me at every stage of this project
and for sharing all of our other adventures

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Introduction

Shall We Continue to Study the Constitutional Treaty?

At the outset it is appropriate to emphasise what is suggested in the secondary title of this treatise, namely, that this is primarily an analysis of the Treaty establishing a Constitution for Europe, the document that from 2004 to 2007 was proposed as the foundational instrument for the European Union.[1]

It is important to begin with this acknowledgement, because at the time of this publication it has recently been decided that the Constitution will

[1] Treaty establishing a Constitution for Europe, officially published at Dec. 16, 2004, O.J. (C 310) 1 [hereinafter Constitution or Constitutional Treaty]. The Constitution was the product of an unprecedented convention that took place over an 18-month period in 2002 and 2003, loftily named the Convention on the Future of Europe. The document produced by the Convention was ultimately approved by the EU's Intergovernmental Conference in June, 2004 and signed in Rome by the heads of state or government of the Member States on October 29, 2004. The document approved by the IGC was a revised version of the draft produced by the Convention on July 18, 2003. Draft Treaty Establishing a Constitution for Europe, July 18, 2003, O.J. (C 169) 1 [hereinafter Draft Treaty 2003]. AUTHOR'S NOTE: For shorthand reference purposes, the Treaty establishing a Constitution for Europe is generally referred to in this treatise as the "Constitution," although in the title to the treatise and in the chapter titles the longer description "Constitutional Treaty" is used. The primary use of "Constitution" is consistent with the scholarship that has been produced in the English language. In other languages – Dutch, for example – scholars have preferred general use of the equivalent of "Constitutional Treaty" (in Dutch, *grondwettelijk verdrag*).

be replaced by a text amending the two principal EU treaties.[2] The rejections of the Constitution by French and Dutch voters in mid-2005 referenda have ultimately led – after two years' efforts to salvage the Constitution – to the conclusion that a new approach was necessary. The "Reform Treaty" that will replace the Constitution will be described below. In light of this development an appropriate question is why, then, should we continue to study the Constitution?

There are two significant justifications for continuing our inquiry into what the Constitution would have meant for the European Union. First, the Reform Treaty (which has not been drafted as of the time this treatise was completed, but whose substantive contents have been agreed upon by the European Council), will contain the majority of institutional and substantive reforms that are found in the text of the Constitution. Second, despite the inability of certain Member States to ratify the Constitution, the document has for several years been the focal point of all discussions relating to the course of further Union integration. The Constitution is likely to hold a well-established place in the ongoing debate over the form of the Union and the complex relationship between the EU and its Member States. This debate has lain at the core of the Union at every stage of its existence, and it will continue. Even as a rejected text, the Constitution and the reasons for its demise will be of academic and political interest. Thus, the Constitution's place in the historical and ongoing development of the Union will be addressed throughout this treatise, as it relates to our primary subject matter – the dividing lines between the EU and its Member States.

What happened to the Constitution?

With the Constitution's fate determined, we may look back at the past three years and recall how the document "almost made it." From the moment

[2] The Constitution would have supplanted the two treaties currently serving as the EU's primary constituent documents, the Treaty establishing the European Economic Community (EC Treaty or TEC) and the Treaty on European Union (TEU), both of which have been most recently amended by the 2001 Treaty of Nice. Constitution art. IV-437. The official citations to the Treaties are: Treaty Establishing the European Economic Community, Mar. 25, 1957, O.J. (C 340) 173, and Treaty on European Union (Maastricht), Feb. 7, 1992, O.J. (C 191) 1. The Treaty of Nice is officially cited as the Treaty of Nice amending the treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, O.J. (C 80) 1. The third foundational treaty is the Treaty establishing the European Atomic Energy Community (EURATOM), Mar. 25, 1957, 298 U.N.T.S. 259, but this treaty would have remained in effect despite the Constitution, as it will if the Reform Treaty is adopted.

of its signing in October of 2004, the ratification process commenced and was well underway when the 2005 referenda in France and the Netherlands signaled trouble. The EU's official response to the problem was reflected in the following statement by the European Council just a few weeks after the French and Dutch plebiscites:

> To date, 10 Member States have successfully concluded ratification procedures, thereby expressing their commitment to the Constitutional Treaty. We have noted the outcome of the referendums in France and the Netherlands. We consider that these results do not call into question citizens' attachment to the construction of Europe. Citizens have nevertheless expressed concerns and worries which need to be taken into account. Hence the need for us to reflect together on this situation. . . .
>
> The recent developments do not call into question the validity of continuing with the ratification process. We agree that the timetable for the ratification in different Member States will be altered if necessary in response to these developments and according to the circumstances in these Member States.
>
> We have agreed to come back to this matter in the first half of 2006 to make an overall assessment of the national debates and agree on how to proceed.[3]

During the "period of reflection" – and consistent with the apparent expectations of the European Council – six additional Member States ratified the Constitution. Latvia, Cyprus, Malta, Estonia and Finland gave their approval through parliamentary action, and Luxembourg produced a positive result in its own referendum. Prior to the June, 2007 meeting of the European Council, which abandoned the Constitution, 16 Member States gave their full approval, while ratifications by Germany and Slovakia were being challenged in the courts of those nations. On the other hand, Poland, the United Kingdom and Ireland had indefinitely postponed their own planned referenda, and other nations likewise decided to bide their time.[4]

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[3] European Council, Declaration by the heads of state or government of the Member States of the European Union on the ratification of the Treaty Establishing a Constitution for Europe, June 18;, 2005, SN 117/05.

[4] Graham Bowley, Luxembourg approves EU charter, Int'l Herald Trib., July 11, 2005. The current status of Member State ratification is recorded the EU's official Europa website: http://europa.eu.int/constitution/ratification_en.htm. For a prescient discussion (prior to the French and Dutch referenda) on the possible responses to a

When the European Council met in June of 2006 it looked back on the previous twelve months and noted in its Presidency Conclusions that a broad debate on the Constitution had taken place and was ongoing. It commented: "While worries and concerns have been voiced during all public debates, citizens remain committed to the European Project."[5] The body then offered a "two-track approach" to the situation. First, after referring to the five latest ratifications, it opted to give the reflection process more time:

> It considers that, in parallel with the ongoing ratification process, further work, building on what has been achieved since last June, is needed before decisions on the future of the Constitutional Treaty can be taken. . . .
>
> [T]he Presidency will present a report to the European Council during the first semester of 2007, based on extensive consultations with the Member States. This report should contain an assessment of the state of discussion with regard to the Constitutional Treaty and explore possible future developments.
>
> The report will subsequently be examined by the European Council. The outcome of this examination will serve as the basis for further decisions on how to continue the reform process, it being understood that the necessary steps to that effect will have been taken during the second semester of 2008 at the latest. Each Presidency in office since the start of the reflection period has a particular responsibility to ensure the continuity of this process.
>
> The European Council calls for the adoption, on 25 March 2007 in Berlin, of a political declaration by EU leaders, setting out Europe's values and ambitions and confirming their shared commitment to deliver them, commemorating 50 years of the Treaties of Rome.[6]

The second statement in the Presidency Conclusions was more assertive. Declaring that "the Union's commitment to becoming more

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negative referendum result, see Bruno de Witte, The Process of Ratification and the Crisis Options: A Legal Perspective, in in The EU Constitution: The Best Way Forward? (Deirdre Curtin, Alfred E. Kellermann & Steven Blockmans, eds., 2005).

[5] European Council, Presidency Conclusions, June 16, 2006, CONCL 2, 10633/06 1.

[6] Id. at 16-17.

democratic, transparent and effective goes beyond the reflection period,"[7] the European Council expressed its intention to immediately begin the implementation of a number of the reforms suggested in the Constitution notwithstanding the current uncertainty about the document's ultimate ratification. It declared that "best use should be made of the possibilities offered by the existing treaties in order to deliver the concrete results that citizens expect."[8] A detailed agenda for a "Europe at work" was presented, with areas of activity to include "promoting freedom, security and justice," "promoting the European way of life in a globalised world," "improving the efficiency, coherence and visibility of the Union's external policies," and "improving the functioning of the Union."[9] The program most obviously reflective of the Constitution is the adoption of an "overall policy on transparency," the primary feature of which will be the opening of many Council of Ministers meetings to the public.[10]

On the heels of the June 2006 European Council summit, the incoming Finnish Presidency commented on how it would address the challenge of the Constitution, but its message was mixed. On one hand, Prime Minister Matti Vanhanen stated: "I am convinced that an enlarging Union needs the Constitutional Treaty that was negotiated by its Member States. . . Thus, Finland has come out in favor of the Treaty as negotiated." Vanhanen also indicated that Finland would ratify the Constitution during the Finnish Presidency in the second half of 2006,[11] and this did happen. On the other hand, Foreign Minister Erkki Tuomioja commented: "We now have almost 100 percent certainty that the constitution in its present form will not be preserved." He suggested that a future treaty revision should retain "as much as possible" of the Constitution's text, but that the name Constitution should be avoided.[12]

Ultimately, pessimism prevailed. German Chancellor Angela Merkel pledged to use Germany's first semester 2007 EU Presidency to revive the Constitution, putting pressure on countries that had not yet ratified at that point. However, a legal action in the German Federal Constitutional Court,

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[7] Id. at 2.
[8] Id. at 16.
[9] Id. at 2-15.
[10] Id at 23 (Annex 1).
[11] Prime Minister Matti Vanhanen, Speech at the plenary session of the European Parliament, (July 5, 2006), available at http://www.eu2006.fi/news_and_documents/speeches/ko27/en_GB/1152081630727.
[12] Lucia Kubusova, Finland seeks better climate for revised EU constitution, Euobserver.com, June 30, 2006, http://euobserver.com/9/21995.

challenging Germany's own ratification of the document, resulted in a court statement that it would not make a definitive ruling in the foreseeable future.[13] With Germany's position in doubt, Chancellor Merkel was left in a most awkward position. Meanwhile, Commission President José Manuel Barroso was described as delivering "last rites" to the Constitution by soundly criticizing the decision to call it by that name,[14] while at the same time he publicly pledged his support for the document's institutional reforms.[15] Not to be deterred by the delicate politics of the moment, others such as MEP Andrew Duff boldly called for a wholesale reconsideration of the Constitution at the IGC level, with the expectation that all of the proposed reforms – and others – would be fair game for negotiation.[16] Finally, hopes that the Netherlands and France would reverse themselves were effectively dashed when recent national elections in those countries offered no realistic expectations of national reconsideration.[17]

The Reform Treaty

By the time the European Council met on June 21 to 23, 2007, Chancellor Merkel and new French President Nicolas Sarkozy had joined together to vigorously press for an end to two years of stalemate between the pro- and anti-Constitution camps. After a protracted session described as rancourous and bitter,[18] the body emerged with a compromise calling for a

[13] Merkel's Constitution hopes on ice, Euractiv.com, http://www.euractiv.com/en/constitution/merkel-constitution-hopes-ice/article-159355.

[14] For an interesting discussion of the impact of the word "Constitution," see Joseph H.H. Weiler, On the Power of the Word: Europe's Constitutional Iconography, in The EU Constitution: The Best Way Forward? (Deirdre Curtin, Alfred E. Kellermann & Steven Blockmans, eds., 2005).

[15] Barroso calls for EU to move beyond constitution debacle, Guardian Online, http://www.guardian.co.uk/print/0,,329602512-106710,00.html.

[16] Duff, Andrew, Plan B: How to Rescue the European Constitution, Notre Europe, available at http://www.unizar.es/euroconstitucion/library/working%20papers/Duff%202006.pdf.

[17] The results of national elections in the Netherlands in November, 2006, offered no mandate whatsoever that the new government would endorse a second attempt at ratification of the Constitution. The same may be said for the French election in May, 2007. New President Nicolas Sarkozy expressed a preference for a modest document (such as the Treaty of Nice) that would amend the existing Treaties, rather than a wholesale re-formulation of the Treaties as in the proposed Constitution. Nicolas Sarkozy's European Plans, Economist, May 10, 2007 at http://www.economist.com/world/europe/displaystory.cfm?story_id=9149133.

[18] Charlemagne, Treaty Blues, Economist, June 30, 2007, at 61.

new IGC to be convened in July, 2007.[19] The IGC's mandate would be to draw up a treaty amendment that would supplant the Constitution. The European Council's highly ambitious agenda called for the "Reform Treaty" to be drafted in a matter of months, with the expectation that the IGC would approve it before the end of 2007 and then refer it to the Member States for ratification before June, 2009.

In its Presidency Conclusions the European Council provided a great deal of detail as to the shape of the Reform Treaty.[20] Its provisions would include the following:

(1) *Primary features:*

> --The Treaty on European Union (TEU) and Treaty establishing the European Economic Community (referred to in this treatise as the EC Treaty or TEC) will remain in effect, each as amended by the Reform Treaty. The TEC will be renamed the Treaty on the Functioning of the Union (acronym to be determined – likely the TFU).
>
> --The Union will succeed the Community and have a single legal personality.
>
> --The Constitution's bold statement on primacy of EU law will be replaced by a Declaration referring to the primacy principle as developed in the case law of the European Court of Justice.
>
> --Certain words emphasising a constitutional character for the EU will be abandoned. Principally, the name "constitution" will be avoided. In addition, the proposed Union Minister for Foreign Affairs will retain the title High Representative. New designations for EU laws, such as "law" and "framework law" will be scrapped in favor of the existing terms "regulation" and "directive."
>
> --Along with avoidance of the name "Constitution," the enshrinement of symbols such as the flag, anthem and motto will be omitted from the Reform Treaty.

[19] European Council, Presidency Conclusions, June 23, 2007, CONCL 2, 11177/07.
[20] See Draft IGC Mandate, Annex I to Presidency Conclusions, id.

(2) *Amendments to the TEU:*

--The Charter of Fundamental Rights will be cross-referenced, but its text will not be included in the Treaty. It will have "the same legal value" as the Treaties, but there will be an exception for the United Kingdom.

--The Constitution's provisions on democratic principles will be added to the TEU. These include the citizens' right of initiative, as well as statements on democratic equality, representative democracy and participatory democracy.

--National parliaments will be offered enhanced rights to object to proposed EU legislation on the ground of subsidiarity.

--Virtually all of the institutional changes proposed in the Constitution, including the new "permanent" President of the European Council and the new Union Minister for Foreign Affairs (who will be called the High Representative), will be included in the Treaty.

--As in the Constitution and the Treaties, the ability of the EU to make "law" in the common foreign and security policy will be limited to non-legislative decisions. Thus, the CFSP will be preserved as a separate "Pillar." Furthermore, it will be emphasised that national security is the "sole responsibility" of the Member States.

--The Constitution's innovative right of a Member State to withdraw from the Union will be carried over into the TEU.

--The Constitution's new, simplified procedures for amending the document will be applied to the Treaties.

(3) *Amendments to the EC Treaty (to be renamed):*

--The Constitution's delineation of the competences of the EU and Member States will be preserved.

--Provisions on the Area of Freedom, Security and Justice will be consolidated in this treaty.

> --New substantive areas proposed in the Constitution – including public services, space, energy, civil protection, humanitarian aid, public health, sport, tourism and administrative cooperation – will be added to the treaty.
>
> --New budgetary procedures in the Constitution will be included.
>
> --EU accession to the European Convention on Human Rights will be expressly permitted.

Overall, the foregoing changes offer a description of a Reform Treaty that would in fact preserve a significant percentage of the substantive innovations proposed in the Constitution. Whether Irish Prime Minister Bertie Ahern is correct that "90% of it is still there"[21] remains to be seen. Scholars will soon be able to lay the Constitution and the Reform Treaty side-by-side and offer their own opinions. For now, it appears that most of the Constitution will live on, and thus its text is of great interest in evaluating the course of European integration.

The path is never smooth

Interestingly, the Constitution's text itself anticipated that ratification might not go smoothly, or at least not on a fixed schedule. Article IV-447(2) states:

> This Treaty shall enter into force on 1 November 2006, provided that all the instruments of ratification have been deposited, or, failing that, on the first day of the second month following the deposit of the instrument of ratification of the last signatory State to take this step.

This language suggests an open-ended approach to the ratification process. More significantly, a declaration annexed to the Constitution provided that if within two years of the signing of the document "four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification," the Constitution would be referred to the European Council for further consideration.[22] This is more or less what happened, and the European Council indeed acted to end the ratification impasse.

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[21] Charlemagne, Treaty Blues, supra note 18.

[22] Declaration (30) on the ratification of the Treaty Establishing a Constitution for Europe, Dec. 16, 2004, O.J. (C 310) 464.

Interrupted development is nothing new for the European Union. Integration during its first half century has occurred despite the tensions caused by ambitious proposals, harsh rhetoric, and occasional setbacks. One might well recall the French "empty chair" in the 1960's and the British blocking of budgetary matters in the 1980's. These were political crises of the first magnitude, threatening the very viability of the EU, but they were overcome. Denmark's initial rejection of the Maastricht Treaty and Ireland's negative referendum on the Treaty of Nice – which were indeed precedent for the French and Dutch actions in 2005 – were likewise seen as major setbacks. In both of those instances the necessary public support was eventually generated to reverse the rejections and permit final ratification of the treaties. The current situation has followed a different path. In short, notwithstanding one challenge after another, the vision and hard work of European leaders has indeed led to "ever closer union" and to the unprecedented melding of the economies and destinies of a diverse group of sovereign nation states.

Scholarly analysis of the Constitution remains relevant

The Constitution did not just appear suddenly. It was in fact the product of many years of effort and of the ongoing evolution of the EU itself.[23] Even though it has been rejected as an instrument, the Constitution did indeed offer a set of highly sophisticated intentions for further development and improvement of the Union. If the Reform Treaty is adopted as the European Council has urged, most of the Constitution's proposed innovations will materialise, albeit in somewhat different clothing. Because of this fact, the already rich scholarship on the Constitution will remain highly relevant to future analysis of the Reform Treaty will look back to the Constitution as readily as it looks back to the TEU, the EC Treaty and their antecedents.

Much of the recent scholarship on the Constitution has focused on particular fields of EU activity within the Union's existing Three Pillars. The first and most prominent of these is the internal market, but increasing

[23] Michiel Brand has written of the importance to recognise "the current constitutional process not as intending to create a constitution for Europe, but as intending to bring about a *new, modified, different and more explicit form of* constitution for Europe. It will, moreover, be asserted that this process towards the elaboration of a future European constitution, is a useful and desirable exercise, signifying an affirmation and refinement of already existing European constitutionalism." Michiel Brand, Affirming and Refining European Constitutionalism: Towards the Establishment of the First Constitution for the European Union 6 (Eur. Univ. Inst., Florence, Working Paper No. 2004/2). Brand's article contains an in-depth exploration of different theories of European constitutionalism.

attention is being paid to the Second Pillar, the EU's common foreign and security policy, and the Third Pillar, police and judicial cooperation in criminal matters. Within these broad areas there has been a wealth of legislation, regulatory enforcement and jurisprudence of the European Court of Justice, and thus the Constitution's proposed changes to the current text of the Treaties merit close scrutiny. However, much is also being written on the overall impact of the Constitution or its replacement. Does the new document signal new subjects for Union activity? Do its institutional changes indicate a power shift among the EU institutions? Will a constitution or treaty amendment enable the Union to assume a more prominent role on the world stage?

Two examples of the high quality of analysis that is underway are the following: The Asser Institute in The Hague held a colloquium on the Constitution in October, 2004, and from that conference a collection of more than 30 essays by a distinguished group of scholars was published in 2005 (prior to the French and Dutch referenda) by T.M.C. Asser Press under the title *The EU Constitution: The Best Way Forward?* Topics of these essays range from the making of the Constitution to particular legal developments, the democratic life of the Union, expansion of judicial and legislative powers and access to justice. Several of these essays are cited in this treatise, and the entire volume is recommended. A second and quite different book is *The Constitution for Europe – A Legal Analysis*, authored by Jean-Claude Piris, Director-General of the Legal Service of the Council of the European Union, and published in 2006 by Cambridge University Press. Mr. Piris was present at all stages of the Constitution's development, and he chaired the Working Party of Legal Experts that refined the final version of the document. As a lawyer, he adds many astute insights to the prospective structural, institutional, procedural and substantive impacts of the Constitution, but it is the wealth of his personal experience in Brussels that enables him to provide invaluable context to all of the document's major innovations. As an insider, he is able to embellish the legal analysis with the key points of the history and politics that led to the details contained in the text of the Constitution.

One of the more intriguing questions raised by the Constitution is how it would impact the delicate relationship between the European Union and its Member States. This is a significant issue within the Union, because the EU has always had a dual focus. On the one hand, the development of the EU has necessitated a central orientation, with significant energy being invested in the creation and management of a group of centralised institutions whose mandate is to represent the collective good of the Union. On the other hand, there has always been a conscious effort to preserve a meaningful role

for the national governments of the Member States within the EU system. Stated in different terms, it has been understood that the benefits of Union action must always be measured against the threat such action poses to the essential sovereignty of the states.[24] Collective success and separate identity are often contradictory, and they are frequently the subject of intense political and academic debate.

Dividing lines

One way to illustrate the tension that is always lurking in the EU is to speak of dividing lines between the Union and its Member States. At their deepest level, the EU's dividing lines reflect political power and jurisdiction that touch upon the very existence of the Union and its members. It is arguable that every increase in EU competence bears with it a corresponding diminishment of the independence and power of the states. But the lines may be more subtle, with some of them describing matters only of rhetorical emphasis that can affect public perceptions of the system without truly relating to allocation of power.

The dividing lines between the Union and the states may be described in terms of the balance of power *within* the EU system, a system in which both EU institutions and the Member States are active. Relevant questions relating to allocation of legislative and administrative power include the following:

> --What institutions are necessary to ensure that the EU reaches its potential, and what authority should they be granted? What is the role of the Member States in those institutions?
>
> --What instruments and decision-making procedures should be employed, and which institutions (including those of the Member States) should participate in particular actions?
>
> --In an expanding Union, how should the internal market be managed, and should there be a role for the Member State governments in its management?

[24] Note, for example, the inherent tension between the free movement of persons offered in connection with the First Pillar internal market (see EC Treaty art. 14(2)), and the protections guaranteed to the Member States with respect to Third Pillar issues of crime prevention (see TEU arts. 29-42). These conflicting regimes are analysed in detail in Chapter 16 of this treatise.

--At what level should social policy be determined? Should key concepts be uniform throughout the EU, or should the Member States maintain local control?

--How should foreign affairs and defence be conducted?

But it is more than just political power that is of interest, more than which institution at which level has the authority to handle a particular task. Beyond allocation of power is the very character of the EU and of the Europe it encompasses. Questions in this regard might include the following:

--Should the Member States continue to enjoy their status as sovereign nations within the world community?

--Where is the loyalty and attachment of the individual European citizen to be focused?

--Where are the manifestations of democracy to be found – at the national level only, at the EU level, or at both levels?

--How much integration is necessary, and where should it stop?

The Member States in many ways define the EU as much as do the EU institutions themselves. The Member States represent the origins of the EU, its historical roots, its diversity of cultures and its multi-faceted political outlook. The continuing vitality and integrity of the Member States are at the essence of the EU, and this treatise will examine the substance of the Constitution in this broader aspect as well as to how decisions are made on specific subjects.

The methodology of this treatise

The approach of this treatise is to analyse the Constitution in historical and contemporary context. The process begins with the identification of a primary theme, namely, the “dividing lines” between the European Union and its Member States. This is a particular point of view relating to the structure of the Union, its unique blend of intergovernmentalism and federalism, and the identity of its constituent Member States. This is but one of many approaches that could be taken in dissecting the Constitution, but it is the author’s opinion that this theme goes to the heart of the EU, both in its history and its ongoing development.

The Constitution is a lengthy and sweeping instrument, and the appropriate first step in the analysis is a careful reading of the document to develop a feel for its structure and substantive content. This straightforward phase of the analysis focuses on the organisation and wording selected by the drafters, with the aim of discerning the meaning of the document on its face. At the same time it is necessary to put the content and organisation of the text into proper perspective by comparing each constitutional chapter and provision with its counterpart, if any, in the Treaties. Whether one ultimately views the Constitution as an attempted tidying-up exercise or a proposed dramatic leap forward, the document is appropriately viewed in light of its direct antecedents. A side-by-side comparison of constitutional text and the Treaties is necessarily mechanical at times, but this detailed comparison ultimately provides valuable insights into the meaning of the Constitution.

Because of the political significance of the Constitution (and of its eventual replacement) there is a myriad of other sources available to provide perspective. The bibliography to this treatise identifies a significant number of "primary" sources, such as other treaties and international agreements, treaty protocols, EU legislation and decisions of the Court of Justice. Most of these sources relate directly to the Constitution and Treaties, and all provide information relevant to the analysis of the constitutional text. Beyond these, there are more than 200 "secondary" sources identified, primarily the comments of EU scholars, but also the opinions of public officials and journalists. These materials provide extrinsic evidence as to the meaning of the Constitution. They address the antecedents of the Constitution, the process of its drafting, the politics behind it all, and many possible interpretations of its text. Taken together, these official, scholarly and popular materials demonstrate how the Constitution represented both a continuation of the EU treaty scheme and a new step along the historical path of European integration.

In pursuit of the dividing lines as a central theme, the text of this treatise does not begin with the Preamble and follow the constitutional text straight on. Rather, the approach is organised around identifiable aspects of the Union's character, including its values and objectives, its state-like attributes, its institutions, its procedures and its substantive competences. The analysis steps back from the Constitution and from the EU itself and asks questions such as: "What is the Union? Is it intergovernmental or federal? Is it a sovereign entity or a club of states? How does it resemble a state and how does it differ? How does it relate to its inhabitants? Is it set in concrete or is it flexible? What institutions and competences does it possess?" By applying this approach and by attempting to answer these questions, the Union's

dividing lines come into clear focus. Following this method we are able to offer useful observations about the Constitution and its potential impact on the unique relationship between the European Union and the Member States. We may reach meaningful conclusions as to whether the Constitution would encroach on the states' identities and competences or whether they would retain their essential sovereignty as nations within a complex intergovernmental organisation.

Outline of this treatise

This treatise is organised into categories that are intended to illustrate critical aspects of the dividing lines between the Union and the Member States. The text is organised as follows:

> --Part One first describes the background of the Constitution and then offers an overview of the findings that are detailed in Parts Two, Three and Four. Chapter 1 explores the historical debate over the basic character and structure of the EU, the debate that addresses whether the current Treaties can or should be replaced by something called a constitution. Chapter 2 reviews the creation of the Constitution, followed by a description in Chapter 3 of how the constitututional text is organised. Chapter 4 describes the major changes proposed in the document.[25] The analysis then continues with two chapters that offer a preview of the balance of this treatise. Chapter 5 introduces the concept of the EU's dividing lines. Chapter 6 describes how the Constitution would shift certain of the dividing lines. The material offered in Chapters 5 and 6 is developed in depth in Chapters 7 through 17.
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> --Part Two, consisting of Chapters 7 through 12, examines how the Constitution defines the essential characteristics of the Union, including its values and objectives, its state-like attributes, its manifestations of democracy, its structural flexibility, the unanimity requirement for amending the Constitution itself, and a set of

[25] It is useful to note that Chapters 1 through 4 serve as background to the analysis of dividing lines within the European Union. For the reader not familiar with the classic debate over the Union's form or not well versed in the history of the Constitution or its textual organisation, these chapters provide a starting point for an appreciation of the Constitution. The reader who has previously studied these subjects may comfortably begin with Chapter 5.

principles underlying its actions. This analysis will also identify how emphasis is placed on the continuing integrity of the Member States.

--Part Three is comprised of Chapters 13 through 15, and they analyse the Union's institutions and how law is made in the EU. Chapter 13 analyses the most important EU institutions and how they may be independent of or subject to control by the Member States. Chapter 14 discusses the instruments and procedures available to the institutions.[26] Chapter 15 then addresses the critical matter of how the unanimous voting requirement on the Council and European Council protects Member State sovereignty. In detail this analysis identifies where the Constitution would have changed the Treaties' unanimity requirement to qualified majority voting (QMV), where it offered new subjects of legislation for which QMV is permitted, and where it would have retained unanimous voting.

--Part Four addresses the Constitution's potential impact on the subject matter of EU activity. Chapter 16 addresses the area of freedom, security and justice, where the Constitution offered some of its most significant departures from the Treaties. Chapter 17 analyses where the dividing lines would shift in regard to other EU activity, both relating to internal activities and to external action.

--Part Five contains final commentary. Chapter 18 offers a critical view on the Constitution as a document, with suggestions for its improvement. Chapter 19 contains a review of key constitutional provisions that favor centralised EU power versus those that emphasise Member State competence. This serves as a summary of how the Constitution would affect the existing dividing lines between the EU and its Member States.

Overall, the analysis will be limited to those aspects of the Constitution and the Treaties that relate to the role of the Member States within the European Union as compared to the role of the EU's own institutions.[27] Other changes not related to these dividing lines are beyond the

[26] Like Chapters 1 – 4, Chapter 14 is included as background material. The reader familiar with the Union's instruments and procedures may forego a review of this chapter.

[27] For a scientific, rather than legal, study of "the optimal assignment of policy tasks to the different levels of government within the EU" and an analysis of how "the competencies between the Union and the Member States [can] be delimited optimally based on economic efficiency," see Fritz Breuss & Markus Eller, The Optimal

scope of the present analysis. Likewise, the full legislative history of the constitutional text is a complex subject that is generally beyond the scope of this treatise. It is also important to recognise that the impact of the Constitution with respect to the substantive areas of EU activity will be the subject of much writing in the coming years. Legal scholars have already begun the long process of commenting on the strengths and weaknesses of the document in various subject areas,[28] and their analysis will eventually fill many volumes.[29] Because of the vast subject matter included in and potentially affected by the Constitution, comments in this treatise on the particular aspects of EU and Member State lawmaking will be offered for illustrative purposes only and are not meant to be comprehensive.

A preview of the conclusions

Two somewhat contradictory conclusions emerge from this analysis. The first is that the drafters of the Constitution were for the most part faithful to the Treaties in carefully preserving the existing dividing lines between the Union and the Member States. Overall, in matters of substance and procedure the Constitution did not offer significant movement of these lines. Under the Constitution the Member States would have continued to enjoy a substantial

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Decentralisation of Government Activity: Normative Recommendations for the European Constitution, 15 Const. Pol. Econ. 27 (2004).

[28] For recent critiques that question and criticise the very notion of a constitution and the process by which it is created, see Cindy Skach, We, the Peoples? Constitutionalizing the European Union, 43 J. Common Mkt. Stud. 149 (2005); Heinrich Schneider, The Constitution Debate (Eur. Integration Online Papers, Working Paper No. 4, 2003).

[29] Overviews on the developing constitutionalism in Europe have long populated the bookshelves of EU scholars. Even before the Convention, this was a popular topic. See, e.g., Constitution-Building in the European Union (Brigid Laffan, ed., 1996); Joseph H.H. Weiler, The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration (1999). As the Convention proceeded and ultimately completed its work, additional commentary kept pace with the official activities. See, e.g., The Post-Nice Process: Towards a European Constitution (Peter A. Zervakis & Peter J. Cullen, eds., 2002); Brendan P.G. Smith, Constitution Building in the European Union (2002); Stefan Collignon, The European Republic: Reflections on the Political Economy of a Future Constitution (2003); Jo Shaw, et al., The Convention on the Future of Europe: Working Towards an EU Constitution (2003); A Constitution for the European Union (Charles B. Blankart & Dennis C. Mueller, eds., 2004); Political Theory and the European Constitution (Lynn Dobson & Andreas Follesdal, eds., 2004); Developing a Constitution for Europe (Erik Oddvar Eriksen, et al. eds., 2004); The Constitution for Europe and an Enlarging Union: Unity in Diversity? (Kirstyn Inglis & Andrea Ott, eds., 2005).

measure of sovereignty despite having previously delegated certain competences to the Union. To those who were concerned that the Constitution represented a great shift of power to Brussels, this treatise argues that their fears were not well-founded.

The second conclusion is that notwithstanding the preservation of most of the EU's dividing lines the Constitution did signal a new legal order for the Union. It would have repealed and replaced the principal Treaties,[30] and it would have eliminated the Pillar structure found in those documents. It would have created a new European Union with legal personality, and this entity would have been the successor to the European Community and the Maastricht EU.[31] It offered the first textual expression that EU law has primacy over Member State law.[32] Furthermore, the proposed document was called a constitution. The importance of all of these developments is debatable, and one might argue that they represented more style than substance. The better position is that there was substance in these proposed changes, but even those who would call them stylistic must acknowledge that in politics and diplomacy new terminology may have signaled a change in attitude and a shift in direction. Style may yield substance in the long run.

Detailed analysis of a document as lengthy as the proposed Constitution requires discipline and patience . . . and time. To overcome some of the logistical challenges inherent in this endeavor, this treatise employs chapter and section arrangements that are clear enough to facilitate easy location of particular subjects. It is hoped that this treatise – either as a whole or in its parts – will prove to be of value to others who may be studying the constitutional development of the European Union.

[30] Constitution art. IV-437(1). The treaties that are supplanted are the EC Treaty and TEU. The Treaty establishing the European Atomic Energy Community remains in effect. See EURATOM, supra note 2.
[31] Constitution art. IV-438(1).
[32] Constitution art. I-6.

Part One: A Constitution for Europe

Chapter 1

The Debate over Form – What is the EU?

From its inception the European Union has had its own structures and institutions, but both the Union and its institutions have always been subject to certain levels of control by the Member State governments. As integration has progressed from the Union's modest beginnings as the European Coal and Steel Community, academic and political observers have struggled to define just what the organization is, and, moreover, what it should be. The following analysis will describe the two principal opposing camps in a debate that regularly resurfaces in Europe. This debate underlies the drafting of the Constitution,[33] and the two schools of thought have radically different ideas as to the proper dividing lines between the EU and its members.

1. TWO SCHOOLS OF THOUGHT

Some commentators and politicians favor an intergovernmental form for the EU, a structure in which all critical decisions must be agreed to by each Member State. Others urge a federal arrangement in which the Union serves as an independent and powerful central government that stands above the national governments. These two approaches will be described, and they will be followed by a description of the middle ground, the "blended entity" theory that better defines the realities of the EU today.

1.1 **The EU as an intergovernmental organisation**

The European Union was created by means of treaties among its founding members, it exists today by virtue of successor treaties, and there are

[33] For a description of the events leading to the drafting of the Constitution, see Chapter 2.

those who believe it should remain as a treaty-based intergovernmental structure.

According to the intergovernmental theory, the EU has in fact continued to operate in large part like an IGO. Peter Lindseth comments that one strand of social science literature "points to the considerable evidence of the Community's continuing intergovernmental nature, notably at the levels of Treaty amendment and of major harmonisation legislation."[34] Armin von Bogdandy likewise asserts that EU continues to retain a "supranational character" because of the EU's traditional treaty-revision process, its requirement of consensus in a number of policy fields, and its lack of "coercive force" against the Member States.[35] Andrew Moravcsik observes that the EU's ability to act in areas such as "budget, defence, police, cultural, educational and social policies" is sufficiently limited that its actions in these fields, if any take place at all, "are hardly different from those of a classic international organisation."[36] G.F. Mancini describes the EU structure as one in which "not only its foreign and security policies, which are openly carried out on an intergovernmental basis, but the very management of its supranational core, the single market, are entrusted, with or without a circumscribed control by the European Parliament, to diplomatic round tables."[37]

Despite the Union's intergovernmental origins and its retention of IGO-like features, it is clear that the EU contains elements that are not strictly intergovernmental in nature.[38] These elements are described below in the descriptions of the federalist and blended entity theories. Lindseth has acknowledged that the EU's range of delegated powers and its "relative independence from unilateral Member State control" distinguish it from other

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[34] Peter Lindseth, Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community, 99 Colum. L. Rev. 628, 655 (1999).

[35] Armin von Bogdandy, The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty, 6 Colum. J. Eur. L. 27, 33 (2000).

[36] Andrew Moravcsik, Conservative Idealism and International Institutions, 1 Chi. J. Int'l L. 291, 309 (2000) [hereinafter Moravcsik 2000].

[37] G.F. Mancini, Democracy and Constitutionalism in the European Union: Collected Essays 65 (2000).

[38] Jan Muller has stated: "Clearly, the Union started as an intergovernmental enterprise, and only over time acquired supranational and infranational characteristics." Jan Muller, Constitutionalism and the Founding of Constitutions: Carl Schmitt and the Constitution of Europe, 21 Cardozo L. Rev. 1777, 1790 (2000).

international organisations.[39] However, he argues that its "legal character" remains similar to that of "other less ambitious experiments with supranational delegation, such as the dispute settlement panels of the WTO."[40] All such IGOs, he asserts, are "essentially of an administrative character" and provide efficient problem-solving mechanisms in place of more cumbersome diplomatic procedures.[41]

The essence of the intergovernmentalist position is that the Member States of the EU must retain their essential sovereignty.[42] The British are strongly identified with this position and are said to champion a "club of sovereign nation-states,"[43] preferring, for example, a greater involvement of national parliaments in EU policy-making over an enhanced role for the European Parliament.[44] Joseph Weiler has called this approach "Thatcherism" and sees its vision of the European Union as "an arrangement, elaborate and sophisticated, of achieving long-term maximisation of the national interest in an interdependent world."[45] This school of thought, according to Weiler, measures the EU's value "ultimately and exclusively with the coin of national utility and not community solidarity."[46]

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[39] Lindseth, supra note 34, at 656, 734.
[40] Id. at 656, 734.
[41] Id.
[42] Michael Newman identifies the insistence on Member State sovereignty with the "realist theory" of international relations. Proponents of this theory, he writes, "have viewed states as the irreducible element in international politics…." The EU is "regarded as a means of managing potential conflict and competition so as to enhance security. But it could never transcend the Member States in the sense suggested by Federalists, for those states are basically using it to promote their own interests. Thus while federalists might condemn governments for opposing the construction of a full political union, realists will argue that this is to be expected: states remain the 'real' actors which operate the international institutions that they establish." Michael Newman, Democracy, Sovereignty and the European Union 17 (1996). Newman groups the realist theory, which many theorists recognize to be "over-simplified," with other schools of thought into a broader category he calls "international relations theories." Id. at 20-21.
[43] Christopher Dickey & Michael Meyer, Is Europe Broken?, Newsweek, Aug. 12, 2002, at 14.
[44] Europe's Convention: The Tortoise is Thinking of Moving, Economist, July 20, 2002, at 41, 42.
[45] Weiler, supra note 29, at 93-94.
[46] Id.

The difficulty with the intergovernmental position is that the EU has evolved significantly from its IGO roots. George Bermann asserts that the Union has:

> traveled further along the road from 'pure' intergovernmentalism than virtually any other international governance regime, and than one might realistically ever have imagined at the outset. No other international governance regime can even plausibly present itself as governing a 'polity', especially a polity in the most day-to-day, operational, 'business as usual' sense of the term.[47]

A vigorous counterpoint to the intergovernmentalist theory is offered by the federal camp.

1.2 **The EU as a federal state**

There have always been federalists in Europe, politicians and others who see the European Union evolving into a centralised federal system that must eventually become a United States of Europe. According to Michael Newman, their school of thought traces back to Altiero Spinelli and his 1941 Ventotene Manifesto, which sets forth the theory that divesting the European nation states of their individual sovereignty would prevent future wars on the continent and solve a host of other vexing problems that would withstand an intergovernmental approach.[48] Joseph Weiler comments that this "*unity* vision of the promised land sees then as its 'ideal type' a European polity, finally and decisively replacing its hitherto warring Member States with a political union of federal governance."[49] These ideas were clearly reflected in the original Treaty of Rome,[50] and Newman asserts that today's federalist perspective "generally holds that the EU is in *the process of becoming a Federation* . . . [and] that the old state-centered world has passed."[51]

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[47] George Bermann, The European Union as a Constitutional Experiment, 10 Eur. L.J. 363 (2004).

[48] Newman, supra note 42, at 16.

[49] Weiler, supra note 29, at 93.

[50] "Anxious to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and backwardness of the less favoured regions…" Preamble to the Treaty Establishing the European Economic Community (consolidated text), Mar. 25, 1957, O.J. (C 325) 41 (2002).

[51] Newman, supra note 42, at 16. Weiler has described the current state of the EU as a "confederation." He writes: "It is not an accident that some of the most successful federations which emerged from separate polities—the United States, Switzerland, Germany—enjoyed a period as a confederation prior to unification. This does not

The European Commission, in its White Paper on European Governance that preceded the Constitutional Convention, agrees that the EU is evolving.[52] While careful to avoid using the word "federal," the document asserts: "It is time to recognise that the Union has moved from a diplomatic to a democratic process, with policies that reach deep into national societies and daily life."[53] Weiler concurs that "the Community's 'operating system' is no longer governed by general principles of public international law."[54] He contends that "constitutionalisation" and a new system of remedies within the EU have eliminated "the most central legal artifact of international law: the notion (and doctrinal apparatus) of exclusive state responsibility and its concomitant principles of reciprocity and counter-measures."[55] Like the Commission, he stops short of saying that these changes have made the EU into a federal state, but he believes that "the Community truly becomes something 'new.'"[56] By way of example, Weiler notes that in establishing the doctrine of "direct effect" of Community law on citizens of the EU, the European Court of Justice set aside the traditional right of a state to determine to what extent the state's treaty obligations will impact its individual citizens.[57] The seminal decision on direct effect was *van Gend en Loos v. Nederlandse Administratie Der Belastingen.*[58] In this case the Court ruled that that it had the competence to determine whether a Dutch company had standing under Community law to directly challenge a Dutch government tariff on certain imported products from Germany. The Dutch government had argued that its national courts should have the exclusive jurisdiction to interpret the scope of the EC Treaty in this instance. The Court declared:

> The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an

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mean that confederation is a prerequisite to federation. It simply suggests that in a federation created by integration, rather than by devolution, there must be an adjustment period in which the political boundaries of the new polity become socially accepted as appropriate for the larger democratic rules by which the minority will accept a new majority." Weiler, supra note 29, at 83.

[52] European Governance: White Paper from the Commission to the European Council, COM (2001) 428 final at 11 [hereinafter White Paper].

[53] Id. at 30.

[54] Weiler, supra note 29, at 12.

[55] Id. at 29.

[56] Id.

[57] Id. at 19-20, 107-109.

[58] Case 26/62, van Gend en Loos v. Nederlandse Administratie Der Belastingen, 1963 ECR 1.

> agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and their citizens. . . .
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> The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subject of which comprise not only Member States but also their nationals.[59]

Armin von Bogdandy is less reticent about labeling EU development as federalism. He contends that "the Union has become an organisation of comprehensive regulation and coordination."[60] To illustrate, he cites the EU's economic policy, its "power over certain mechanisms of macroeconomic policy coordination, which can culminate in restrictions on national budgetary policy and the possible imposition of severe sanctions on Member States" and its increasing activities in "classical state functions" such as "justice, security and (indirect) regulation of citizenship."[61] He argues that in these spheres the Union "can hardly be distinguished from the central level of a federal state."[62] Furthermore, Von Bogdandy notes that the Maastricht and Amsterdam Treaties "promulgate objectives and competencies for the creation and preservation of a unitary territory" and that the concept of EU citizenship is becoming more clearly defined and significant.[63] He asserts that in analysing these developments "one finds clear federal dynamics in the sense that a government for a defined territory and a defined citizenship exists and the sovereign authority defines itself in these terms."[64]

Although the European Union may already possess federal elements, its ardent federalists believe that more is needed. German Foreign Minister Joschka Fischer, in his noteworthy speech of May 12, 2000, at Humboldt University in Berlin, expressed his concerns that a "tension has emerged between the communitarisation of economy and currency on the one hand and

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[59] Id.
[60] Von Bogdandy, supra note 35, at 33.
[61] Id.
[62] Id.
[63] Id. at 34-36.
[64] Id. at 36.

the lack of political and democratic structures on the other."[65] He urged that "productive steps" be taken to avoid crises in the EU and to complete "the process of integration."[66] In even bolder terms he proposed "the transition from a union of states to full parliamentarisation as a European Federation."[67] In similar tones G.F. Mancini has asserted that "the confederal set-up has given rise to contradictions which grow in direct proportion to the growth of the Union's powers and which only a leap towards federalism can hope to overcome."[68] Luís Lobo-Fernandes argues that a "neo-federal modality" for the EU would "make possible a qualitative institutional leap," and he asserts that "a federal type of arrangement has a decisive advantage over the traditional diplomatic mechanism: it does not allow the system to be taken over by any group or coalition, because it guarantees the expression of various interests in an environment of reinforced democratic legitimacy."[69]

But Europe is Europe after all, and even the federalists stop short of calling for an EU resembling the American model. The deeply entrenched national identities of the European people and their rich cultural (and often national) histories suggest that even a federal system must look "European." G.F. Mancini speaks of "a European political entity organised along the lines of a state—a state, of course, without a nation—respectful of the identity of the peoples of which it is composed."[70] Joschka Fisher likewise acknowledges that the idea of a new federal state that would replace the Member States as the new sovereign power "shows itself to be an artificial construct which ignores the established realities in Europe."[71] He adds that further integration of the EU will be workable only if it "takes the nation-states along with it into

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[65] Joschka Fischer, From Confederacy to Federation: Thoughts on the Finality of European Integration, Speech at the Humboldt University in Berlin, 4 (May 12, 2000), transcript available at http://www.auswaertiges-amt.de/www/de/infoservice/download/pdf/reden/redene/r000512b-r1008e.pdf.

[66] Id.

[67] Id. at 7.

[68] Mancini, supra note 37, at 66. Youri Devuyst similarly argues for a "reinvigoration of the European integration process through the creation of a Federation of Nation States based on a coherent Constitutional system among those European countries willing to leave behind ancient notions of sovereignty." Youri Devuyst, The European Union's Constitutional Order? Between Community Method and Ad Hoc Compromise, 18 Berkeley J. Int'l L. 1, 7, 51-52 (2000). Further federal development, according to Devuyst, would "pursue the institutional logic behind the Rome Treaty." Id. at 51.

[69] Luís Lobo-Fernandes, Por um sistema bicamarário na UE, Expresso (Lisbon), June 7, 2003, at 30 (Luís Lobo-Fernandes trans.).

[70] Mancini, supra note 37, at xxvi.

[71] Fischer, supra note 65, at 7.

such a Federation, only if their institutions are not devalued or even made to disappear."[72] In short, he admits that the successful completion of European integration must be based on "a division of sovereignty between Europe and the nation-state."[73]

Critics of the federal approach would agree. Joseph Weiler contends that it would be "more than ironic if a polity with its political process set up to counter the excesses of statism ended up coming round full circle and transforming itself into a (super)state."[74] He adds that it would be "equally ironic that an ethos that rejected the nationalism of the Member States gave birth to a new European nation and European nationalism."[75] He concludes that "we are not about to see the demise of the Member States, at least for a long time."[76] In view of all of the practical and political challenges to creation of a true federal state, Giandomenico Majone maintains that "[f]ully fledged federalism . . . does not enjoy widespread political support at present."[77] Andrew Moravcsik expresses it even more strongly: "Save perhaps in the minds of a few remaining true federalist believers and their conservative idealist critics, the dream of a European state supplanting the nation-state is finished, if indeed it ever existed."[78] Michael Newman examines the federalist and intergovernmentalist schools of thought and comments: "Federalism and realism constitute the two extremes in academic analysis of the EU and most contemporary theorists fall somewhere between them."[79] It is now appropriate to survey that middle ground.

2. THE EU AS A BLENDED ENTITY

Despite their differences of opinion, intergovernmentalists and federalists must agree that the European Union is a system that contains features of both models. As such, it might be described as a blended entity, a political cocktail whose bartenders are constantly experimenting to get the mix of ingredients just right.

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[72] Id.
[73] Id.
[74] Weiler, supra note 29, at 94.
[75] Id.
[76] Id.
[77] Giandomenico Majone, Europe's 'Democratic Deficit': The Question of Standards, 4 Eur. L.J. 5, 27 (1998).
[78] Moravcsik 2000, supra note 36, at 308.
[79] Newman, supra note 42, at 18.

Many similar labels have been applied to describe the EU. Murray Forsyth has compared the European Community of the early 1980's to several confederal entities.[80] Lothar Funk has called the Union a "hybrid."[81] Ian Ward has described it as a "post-modern polity,"[82] to which Jerome Rabkin adds that it "twists and bends traditional attributes of statehood or national sovereignty."[83] Kalypso Nicolaidis describes the EU as "neither simply a *Union of democracies* [described in this treatise as the IGO model] nor a *Union as democracy* [described in this treatise as the federal model]," but a "third way," manifested as a "demoi-cracy" comprised of many peoples and their various states.[84] Pavlos Eleftheriadis has asserted that the EU is comprised of a "complex set of institutions that follow both statist and federalist paths," and he adds that its institutions "are not defined by the rights of a single 'European people' but by a cosmopolitan project of republican states."[85] He also refers to the Union's "*sui generis*" nature that "manages to go beyond the model of national democracy without creating a Federal Europe."[86] Armin von Bogdandy describes the EU as a "functionally-oriented form of political and legal organisation" rather than a "territorially-oriented one"[87] and sees its organisational structure as "characterised by polycentrism and fragmentation."[88] Michael Newman cites a variety of "integration

[80] Murray Forsyth, Unions of States, at 10-16, 160-87 (1981).

[81] Lothar Funk, A Legally Binding EU Charter of Fundamental Rights?, 37 Intereconomics 253, 262 (2002). Another commentator has called the EU a hybrid, an entity "exceeding the territory of international law, yet without the coherence of a federal state." Jiri Priban, European Union Constitution-Making, Political Identity and Central European Reflections, 11 Eur. L.J. 135, 149 (2005).

[82] Ian Ward, Identity and Difference: The European Union and Postmodernism, in New Legal Dynamics of European Union, 15, 21-26 (Jo Shaw & Gillian More eds., 1995).

[83] Jeremy Rabkin, Is EU Policy Eroding the Sovereignty of Non-Member States?, 1 Chi. J. Int'l L. 273, 275 (2000).

[84] Kalypso Nicolaidis, The New Constitution as European Demoi-cracy? The Federal Trust Online Paper 38/03, at 5, available at http://www.fedtrust.co.uk/ uploads/constitution/38_03.pdf.

[85] Pavlos Eleftheriadis, The European Constitution and Cosmopolitan Ideals, 7 Colum. J. Eur. L. 21, 39 (2001).

[86] Id. at 28. Giandomenico Majone also refers to the "sui generis institutional architecture of the Community." Majone, supra note 77, at 8.

[87] Von Bogdandy, supra note 35, at 32.

[88] Id. at 28. Von Bogdandy also comments that "the Treaty of Amsterdam has a substantial unifying potential. However, even if this potential is fully realized, the Union will remain an organisation that does not represent a societal and political unity in the sense of a nation. Similarly, its political system is constitutively far more fragmented than political systems of a state." Id. at 38.

theories" such as "neo-functionalism . . . co-operative federalism, neo-federalism and also a non-specific form of economic determinism."[89] Joseph Weiler refers to a "community vision" in which the Member States and the EU "continue their uneasy co-existence, although in an ever-increasing embrace."[90]

The "uneasy co-existence" is due to the prominent role of the Member States within the EU. Pavlos Eleftheriadis asserts that "the debate concerning European integration and its institutions is not about degrees of democracy. That would be too simple. The debate is also about the role of states in a cosmopolitan framework."[91] Jan Muller views the Union as a "dual system," one in which "the member states are both inside and outside the constitutional system. Sovereignty is then shared in 'normal times' of European governance…but it reverts to the plural constituent power [i.e. that of the Member States] in moments of constitutional remodeling."[92] Within the EU there is also a division of power that at times heavily favors the influence of the Member States. The Maastricht Treaty (TEU) established three "pillars" of government,[93] and Giandomenico Majone has described the EU's arrangement as containing "two distinct elements: an intergovernmental component, where international features dominate (European Council, Council of ministers, and the second and third 'pillars' of the TEU), and a communitarian component where supranational features are most evident (European Parliament and Courts, Commission, and the policies and activities included in the first 'pillar' of the TEU)."[94]

The unusual structure of the EU is not the only feature that distinguishes it from a typical nation-state. Andrew Moravcsik illustrates a number of substantive differences by describing the many competencies of a state that have *not* been granted to the Union, including "taxation and the setting of fiscal priorities, social welfare provision, defence and police

[89] Newman, supra note 42, at 18-19.
[90] Weiler, supra note 29, at 93.
[91] Eleftheriadis, supra note 85, at 39.
[92] Muller, supra note 38, at 1792.
[93] Article 1 of the TEU states: "The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty." TEU art. 1. The First Pillar covers the entirety of the European Community's traditional common market activity, while the Second and Third Pillars cover cooperation among the Member States in the areas of Common Foreign and Security Policy (Second Pillar) and Cooperation in the Spheres of Justice and Home Affairs (Third Pillar). See Neill Nugent, The Government and Politics of the European Union 69 (2003).
[94] Majone, supra note 77, at 12.

powers, education policy, cultural policy, non-economic civil litigation, direct cultural promotion and regulation, the funding of civilian infrastructure, and most other regulatory policies unrelated to cross-border economic activity." He notes that "the EU has made modest inroads into many of these areas, but only in limited areas directly related to cross-border flows."[95] He has also asserted: "Institutionally, [the EU's] actions in these areas, if there are any at all, are hardly different from those of a classic international organisation."[96] Moravcsik contends that "the spectre of a European superstate is an illusion."[97] Eleftheriadis concurs: "The European Union is not a state and does not resemble one closely. It does not have the 'monopoly of force' or other features of statehood: an army, courts or a comprehensive central government."[98] Giandomenico Majone notes that the EU has no general taxing and spending powers and that "with a budget of less than 1.3 percent of Union GDP which, moreover, must always be balanced, it can only undertake a limited range of policies."[99] Armin von Bogdandy also emphasises that the EU lacks the ability to redistribute wealth to any appreciable extent and that it "lacks the power for coercing Member State compliance . . . with the Union's law."[100] He adds: "A close analysis of the developing lines of the European Union from a dynamic perspective reveals more differences than analogies to a state-building process. These differences underline the Union's qualification as a new form of government."[101]

The state-like elements that do exist within the European Union, such as delegation of certain competencies to the central government, separation of powers into legislative, executive and judicial functions, and a popularly elected parliament, are not necessarily a sign that the EU is becoming a federal state. Larry Cata Backer reminds us that in the early United States the "nature and structure of the union" and "the relative powers of state and general government within the federal scheme" were "hotly debated," and that

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[95] Andrew Moravcsik, In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union, 40 J. Common Mkt. Stud. 603, 607 (2002) [hereinafter Moravcsik 2002]. Moravcsik further argues that "by limiting the EU's fiscal, administrative or coercive resources, the member states have imposed permanent limits on nearly all the policies most politically salient to European voters." Andrew Moravcsik, The EU Ain't Broke, Prospect, Mar. 2003, at 40-41, available at http://www.prospect-magazine.co.uk. [hereinafter Moravcsik 2003].

[96] Moravcsik 2000, supra note 36, at 309.

[97] Moravcsik 2003, supra note 95, at 39.

[98] Eleftheriadis, supra note 85, at 26.

[99] Majone, supra note 77, at 10.

[100] Von Bogdandy, supra note 35, at 36-37.

[101] Id. at 41.

the current form of American government was not an inevitable result.[102] Thus, he argues, even though a "form of federal union" may have appeared in Europe, it need not presage an American-style superstate.[103] He asserts: "Federations ought not to frighten states' rights advocates in Europe. The nature of federalism is not set in stone, nor has the world yet witnessed all of the multiple forms of governance which can be constructed within the spirit of this principle."[104] Armin von Bogdandy likewise observes that "federal thought is not restricted to state polities. The notion of federation has always been used for non-state organisations. It is not necessarily connected with a vision of nation-building."[105] Majone predicts that even if aspects of federalism increase within the EU, "there is no reason at all to think that the political and constitutional arrangements of the future will mirror the institutional architecture of the nation-state."[106]

Predictions on the future of the EU as a blended entity range from cautious to enthusiastic. Muller, while lauding the Union's "high degree of flexibility,"[107] believes that there will be "further muddling through well-intentioned proposals for amendments, which then fail at intergovernmental conferences, and, above all, constitutional clashes at the EU's core. As a result of the latter, there will be actual gradual reform."[108] Majone warns that the Union's "historically unique approach to integration can succeed only if the economic and the political tracks are carefully kept separate,"[109] and he predicts a system with "[o]verlapping jurisdictions, legal pluralism, extensive delegation of powers to transnational organisation—in short, a new 'medievalism.'"[110] Newman maintains that most integrationists "now accept that integration will proceed in 'fits and starts' rather than 'ever upward' . . . and that the features which have made [the EU] so distinct will become more pronounced as time goes on."[111] Udo Di Fabio sees hope in "an emerging new model of multi-level democracy, characterised by contemporaneous

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[102] Larry Cata Backer, The Extra-National State: American Confederate Federalism and the European Union, 7 Colum. J. Eur. L. 173, 176-77 (2001).
[103] Id. at 195.
[104] Id. at 238.
[105] Von Bogdandy, supra note 35, at 51.
[106] Majone, supra note 77, at 27.
[107] Muller, supra note 38, at 1791.
[108] Id. at 1795. The failure of the December 2003 Intergovernmental Conference to approve the Draft Constitution is precisely the dynamic predicted by Muller. See Thomas Fuller, Split on voting rights sinks the EU constitution, Int'l Herald Trib., Dec. 15, 2003, at 1.
[109] Majone, supra note 77, at 14.
[110] Id. at 27.
[111] Newman, supra note 42, at 19-20

hierarchies and cooperative relationships."[112] The doxology is provided by Andrew Moravcsik, who, on the eve of the EU's Constitutional Convention, wrote:

> Let us appreciate how much Europe has achieved. We should not be trapped by rhetoric or fears about what it aspires to be. The EU is not a United States of Europe in the making. Instead, it should be seen for what it is—the most successful international organisation in history. The secret of that success lies not only in the Europeans' willingness to centralise certain types of political power, but also in knowing how to mold and limit that power.[113]

It is clear that the blended entity theory is the realistic point of view, that it offers an attractive – and correct – alternative to the extremes of the intergovernmental and federal schools of thought.[114] The European Court of Justice recognized the "in-between" status of the Community in the *van Gend en Loos* decision, when it declared that "the Community constitutes a new legal order of international law" in which the Member States "have limited their sovereign rights, albeit within limited fields."[115] An excellent description of the limits of the EU's power and the retained sovereignty of the Member States is the following statement by Juliane Kokott, an Advocate General of the Court, and Alexandra Ruth:

> [T]he Constitution is not the product of an autonomous *pouvoir constituant européen.* Instead, it is established by an international treaty as the expression of a *volonté constituante* of the Member States, which is, however, itself based on the sovereignty of their people.[116]

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[112] Udo Di Fabio, A European Charter: Towards a Constitution for the Union, 7 Colum. J. Eur. L. 159, 167 (2001).

[113] Andrew Moravcsik, If It Ain't Broke, Don't Fix It, Newsweek Int'l, Mar. 4, 2002, at 15, available at 2002 WL 8965081.

[114] David Miliband, a Member of the UK Parliament, asserts that there is a need for "a realistic and hard-headed alternative to the false choice between inter-governmentalism and supra-nationalism." David Miliband, Perspectives on European Integration: A British View (Max Planck Inst. for the Study of Societies, Working Paper No. 02/02, 2002), available at http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp02-2/wp02-2.html.

[115] Case 26/62, van Gend en Loos, supra note 58.

[116] Juliane Kokott & Alexandra Ruth, The European Convention and its Draft Treaty Establishing a Constitution for Europe: Appropriate Answers to the Laeken Questions?, 40 C.M.L.R. 1315, 1320 (2003). For a useful recent analysis of sovereignty within the EU system, see Anneli Albi & Peter Van Elsuwege, The EU

The ensuing comparison of the Constitution to the Treaties will illustrate whether and how the EU's blended nature will be preserved.

Constitution, National Constitutions and Sovereignty: An Assessment of a "European Constitutional Order," 29 Eur. L. Rev. 741 (2004).

Chapter 2

The Genesis of the Constitutional Treaty

The Constitution was intended to replace the EU's primary constituent documents, the Treaty Establishing the European Economic Community (EC Treaty) and the Treaty on European Union (TEU).[117] The treaties have been a work in progress, the subject of regular amendment,[118] but in their evolution, they have grown to be increasingly complex.

The EC Treaty establishes the European Community, and it contains most of the provisions defining the body's institutions and regulating the internal market.[119] The TEU creates the European Union, which essentially retains and shares the EC Treaty's institutional provisions. It also leaves in place the EC Treaty's economic provisions as the "First Pillar" of a broader system.[120] However, the TEU expands the scope of activity by establishing a Second Pillar relating to a common foreign and security policy and a Third

[117] Constitution art. IV-437. References to the EC Treaty and TEU are found in note 1 supra. The EURATOM treaty, supra note 2, would remain in effect.

[118] The major amendments have included: Treaty Establishing a Single Council and a Single Commission of the European Communities (Merger Treaty), Apr. 8, 1965, O.J. (L 152) 2; Single European Act, Feb. 7, 1986, O.J. (L 169) 1; Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, O.J. (C 340) 1; Treaty of Nice, supra note 2.

[119] EC Treaty pt. III.

[120] The Treaties do not actually refer to "pillars." Article 1 of the TEU states: "The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty." TEU art. 1. The First Pillar covers the entirety of the European Community's traditional common market activity. See Nugent, supra note 93. See also Deirdre Curtin, The Constitutional Structure of the Union: A Europe of Bits and Pieces, 30 C.M.L.R. 17, 22–30 (1993).

Pillar governing police and judicial cooperation in criminal matters.[121] Awkwardly, the operative entity for the First Pillar is still the European Community, while the European Union acts under the Second and Third Pillars. At the same time the Union forms umbrella organisation over all three of the Pillars. And if that isn't complicated enough, notwithstanding the continuing separate existence of the Union and Community it is common to refer to the EU when describing any activity relating to any Pillar.

Criticisms of the EU treaty structure are not new, but one of the more apt comments has come from British Foreign Secretary Jack Straw:

> While the practical achievements of the EU have been profound, the Union's treaties fail almost every test of clarity and brevity . . . For a start, there is not one constitution, but two. One "on European union," the other "establishing the European community" . . . both have overlapping preambles with "objectives," "tasks," and "principles." As for the institutional arrangements, they are shared between the two treaties. These complex texts make the case for a single, coherent constitution for the EU . . . real reform is urgently needed.[122]

Other commentators have referred to the Treaties as a "hodgepodge"[123] and an "ad hoc and often incoherent set of documents."[124]

The drive for a new constitution was born of such frustrations. German Foreign Minister Joschka Fischer, in a seminal address on May 12, 2000, at Humboldt University in Berlin,[125] expressed his concerns that the Union was in danger of becoming "utterly intransparent."[126] He asserted that "productive steps" should be taken to complete the process of integration,[127] and he proposed "the transition from a union of states to full parliamentarization as a European Federation."[128] He added: "This Federation will have to be based on a constituent treaty," and he urged moving beyond

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[121] TEU arts. 11–28 (Second Pillar), 29–42 (Third Pillar).
[122] Jack Straw, Special Report: A Constitution for Europe, The Economist, Oct. 12, 2002, at 55.
[123] Simon Heffer & Edward Heathcoat Amory, Blueprint for Tyranny, Daily Mail (London), May 8, 2003, at 12.
[124] Unconventional Wisdom, Times London, May 14, 2003, at 23.
[125] Fischer, supra note 65.
[126] Id. at 6–7.
[127] Id. at 4.
[128] Id. at 7.

the "fears and formulae of the 19th and 20th centuries"[129] to a Europe "established anew with a constitution . . . centred around basic, human and civil rights, an equal division of powers between the European institutions and a precise delineation between European and nation-state level."[130]

Fischer's call received a response in early 2001 from the intergovernmental Conference (IGC) that approved the Treaty of Nice, which provided the latest amendments to the EC Treaty and TEU.[131] The IGC appended to the Treaty a declaration that called for a "deeper and wider debate about the future of the European Union."[132] Among the basic issues to be addressed in this debate were the following:

> --how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity;
>
> --the status of the Charter of Fundamental Rights of the European Union, proclaimed in Nice . . . ;
>
> --a simplification of the Treaties with a view to making them clearer and better understood without changing their meaning;
>
> --the role of national parliaments in the European architecture.[133]

The Nice Declaration indicated that a further pronouncement from the European Council would be forthcoming at its December 2001 meeting in Laeken, Belgium.[134]

In July of 2001, the European Commission entered the discussion by publishing its White Paper on European Governance,[135] which asserted: "Many people are losing confidence in a poorly understood and complex system to deliver the policies that they want."[136] Among the "principles of

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[129] Id.
[130] Id. at 9.
[131] Treaty of Nice, supra note 2.
[132] European Council, Declaration on the future of the Union, Mar. 10, 2001, O.J. (C 80) 85 (2001) [hereinafter Nice Declaration].
[133] Id. at 85-86.
[134] Id. at 85.
[135] White Paper, supra note 52.
[136] Id. at 3.

good governance" to which the EU should aspire, openness and coherence were listed as critical to making EU policy "accessible" and "easily understood."[137] The Commission, however, observed that these principles were not being followed: "The European Union's policies and legislation are getting increasingly complex."[138] The White Paper also noted that the EU "needs clear principles identifying how competence is shared between the Union and the Member States."[139] Therefore, a call was issued for "a comprehensive programme of simplification of existing rules . . . regrouping legal texts, removing redundant or obsolete provisions, and shifting non-essential obligations to executive measures."[140] The Commission committed that it would "simplify further existing EU law"[141] and propose appropriate "Treaty changes" or "constitutional reform" to the European Council at the upcoming IGC in Laeken.[142]

As anticipated, on December 14-15, 2001, the European Council issued its Declaration on the Future of the European Union (the Laeken Declaration).[143] The document observed that EU citizens "are calling for a clear, open, effective, democratically controlled Community approach,"[144] and it described the need for clearer division of competence between the Union and the Member States, simplification of EU legislation and more democracy, transparency and efficiency in Union institutions.[145] The crux of the problem, according to the Declaration, was a need for simplification of the Union's Treaties. In a series of statements under the heading "Towards a Constitution for European Citizens" the European Council presented the following challenges:

> The European Union currently has four Treaties.[146] The objectives, powers and policy instruments of the Union are currently spread

[137] Id. at 10.
[138] Id. at 18.
[139] Id. At 34.
[140] Id. at 23.
[141] Id. at 5.
[142] Id. at 34–35.
[143] European Council, Laeken Declaration on the Future of the European Union, in Presidency Conclusions: European Council Meeting in Laeken, Dec. 14-15, 2001, Annex I, SN 300/1/01 REV 1, at 19, 20, available at http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm [hereinafter Laeken Declaration].
[144] Id. at 21.
[145] Id. at 21-23.
[146] In addition to the EC Treaty and TEU, the other treaties in effect in 2001 were the Treaty establishing the European Atomic Energy Community (EURATOM), supra

> across those Treaties. If we are to have greater transparency, simplification is essential.
>
> Four sets of questions arise in this connection. The first concerns simplifying the existing Treaties without changing their content. Should the distinction between the Union and the Communities be reviewed? What of the division into three pillars?
>
> Questions then arise as to the possible reorganisation of the Treaties. Should a distinction be made between a basic treaty and the other treaty provisions? Should this distinction involve separating the texts? Could this lead to a distinction between the amendment and ratification procedures for the basic treaty and for the other treaty provisions?
>
> Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights.
>
> The question ultimately arises as to whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in the Union. What might the basic features of such a constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union?[147]

The Laeken Declaration called for a Convention on the Future of Europe to be convened in 2002, to produce a document that would provide a "starting point" for discussions at the next IGC.[148]

In the inaugural session of the Convention, on February 26, 20002, Chairman Valery Giscard d'Estaing warned that "[t]he process of European union is showing signs of flagging. . . . The decision-making machinery has become more complex, to the point of being unintelligible to the general

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note 2, as amended, and the Treaty establishing the European Coal and Steel Community (ECSC), Apr. 18, 1951, 261 UNTS 140, as amended. The ECSC lapsed as a separate treaty in 2002, and its assets, liabilities and programs were transferred to the European Community. Under the Constitution, EURATOM would remain in effect, amended by the Constitution.

[147] Laeken Declaration, supra note 143, at 23-24.

[148] Id. at 24-25.

public."[149] He referred to a "tangled skein of powers [and] the complexity of procedures,"[150] and commented: "We shall have to respond to the request for simplification of the Treaties, with the aim of achieving a single Treaty, readable by all, understandable by all."[151]

On July 18, 2003, seventeen months after Giscard d'Estaing's opening address, he and his fellow Convention representatives produced the Constitution under the title of "Draft Treaty Establishing a Constitution for Europe."[152] Although the assembly's procedures were criticized,[153] and although some commentators questioned whether there had been true accord

[149] Valery Giscard d'Estaing, Introductory Speech to the Convention on the Future of Europe 5 (Feb. 26, 2002), available at http://european-convention.eu.int/docs/speeches/1.pdf [hereinafter Giscard d'Estaing].

[150] Id. at 7. During the Convention Giscard d'Estaing observed that his study of the Mandarin language was easier than mastering the EU Treaties and agreements. Dickey & Meyer, supra note 43, at 14.

[151] Giscard d'Estaing, supra note 149, at 11. As the Convention proceeded, Jean-Luc Dehaene echoed Giscard d'Estaing's sentiments as follows: "If, in the Convention, we succeed to make the EU, its Treaty and its texts, its procedures and its processes, more 'understandable,' we will have helped to remove a major obstacle that stand[s] in the way of achieving informed interest and involvement of citizens with EU affairs." Jean-Luc Dehaene, Vice President of the European Convention, Understanding Europe: The EU Citizen's Right to Know, Speech Before the Conference Organized by the Friends of Europe in Brussels 6 (Apr. 3, 2003), available at http://european-convention.eu.int/docs/speeches/8285.pdf.

[152] Peter Norman has written an invaluable on-the-scene account of the Convention from inception to adjournment. His book supplies great detail about the activities of Giscard d'Estaing's Praesidium, the various working groups, and the plenary sessions, including the mechanics of drafting the Constitution and the politics of negotiating its more controversial provisions. Norman also provides valuable information about the personalities who affected the Convention and thus the Constitution itself. See Peter Norman, The Accidental Constitution – The Story of the European Convention (2003).

[153] The Convention's plenary sessions were held only once or twice per month, and generally for no more than two days per session. See the official website for the European Convention, at http://european-convention.eu.int/sessplan.asp?lang=EN. Larry Siedentop has commented that the meetings were not "frequent enough for members to come up with new ideas. Intimacy is needed for such a group to develop a mind of its own." Larry Siedentop, We the People Do Not Understand, Fin. Times, June 5, 2003, at 21. Another commentator has referred to a "serious truncation and imbalance in the Convention's debates." Kirsty Hughes, A Dynamic and Democratic EU or Muddling Through Again?, The Federal Trust Online Paper 3 (August 2003), available at http://www.fedtrust.co.uk/uploads/constitution/25_03.pdf.

among the delegates,[154] the Convention's Praesidium felt at liberty to claim that it had accomplished what the Laeken Declaration had mandated, and it referred the document to the European Council as the product of "broad consensus."[155]

A nearly-completed draft of the Constitution was submitted to the European Council at its meeting in June of 2003. Some final work was permitted after the session, and the final Draft was submitted by the Convention on July 18th. This Draft was the subject of discussion at the intergovernmental Conference that convened on October 4, 2003, and some amendment to the constitutional text ensued. The 2003 IGC met again in December of 2003 and in June of 2004, and on June 18, 2004, it approved what became the final version of the Constitution. It was this version that was signed in Rome on October 29th of that year.[156] The next step was to be a two-year period of ratification, but as discussed in the introductory chapter of this treatise, that process has been interrupted.

The foregoing description of the Constitution's birth should not be taken as the complete story. In the pre-Convention period many activities and many proposals contributed to a process that eventually led to the writing of the Constitution. Some might well argue that the entire history of the European Union served as the run-up to the Convention, and that the Constitution was the inevitable result of that history. However, such a *post hoc ergo propter hoc* approach would not do justice to what is the unique and remarkable heart of this story. There had never before been a convention for

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[154] No votes were taken at the Convention's plenary meetings. Daniel Dombey & George Parker, Dual Ambitions, Fin. Times, May 24, 2002, at 13. Giscard d'Estaing was accused of inventing consensus where it hardly existed and brushing aside dissenting voices. Id. See also George Parker, Political Leaders Are Starting to Take Seriously Discussions on a New Constitution for an Enlarged Union, Fin. Times, Dec. 31, 2002, at 13. Three Benelux delegates wrote that they "deplored the procedure followed." Letter from the Benelux countries to Valery Giscard d'Estaing, Chairman of the European Convention (Apr. 25, 2003) (on file with the Netherlands Ministry of Foreign Affairs), available at http://www.minbuza.nl/default.asp?CMS_ITEM=64E844AE637C4B2E89B3957CE2028F89X88X67360X33. A Finnish government representative described the workings of the Convention as "extremely ugly to watch." Teija Tiilikainen, Finnish Delegates Reject Draft EU Constitution, Helsingin Sanomat (Helsinki), July 10, 2003, available at http://www.helsinki-hs.net/.

[155] Draft Treaty 2003, supra note 1.

[156] For a description of the final negotiations on the text of the Constitution and the discussions at various meetings of the 2003 IGC, see "Work of the IGC 2003/2004," available at http://europa.eu.int/scadplus/cig2004/index_en.htm.

the purpose of amending the Treaties, and past history of the Union would more logically have suggested that an IGC be convened to consider a post-Nice treaty amendment. Looking back, the issuance of the Laeken Declaration stands out as the seminal event among all those that contributed to the drafting of the Constitution. At that moment in December of 2001 the European Council made a deliberate decision to advance into unknown territory and to propel EU development into a new direction. The success or failure of that bold stroke remains to be seen.

Chapter 3

The Structure of the Constitutional Treaty's Text

In Chapters 1 and 2 we examined the context of the Constitution, its historical underpinnings and its creation, while the remainder of the treatise focuses on the text of the Constitution, frequently comparing it to the Treaties to determine its potential impact on the dividing lines between the EU and its Member States. This examination may be enhanced by a brief overview of the structure of the Constitution. It is a lengthy document, and it is always useful to be clear as to where a particular provision fits into the textual organisation. To the reader who is new to the Constitution or otherwise not intimately familiar with its text, this chapter can serve as a reference guide to the analysis in Chapters 4 and following.

1. OVERALL STRUCTURE

The Constitution begins with a Preamble that describes the Union's heritage and objectives. The body of the document is divided into four parts: Part I, which is untitled, broadly defines the Union, its competences and its institutions. Part II is captioned "The Charter of Fundamental Rights of the Union." Part III is entitled "The Policies and Functioning of the Union." Part IV contains "General and Final Provisions." Various protocols and declarations follow the Constitution's text. The individual articles of the Constitution are numbered consecutively from 1 to 448, although it is standard practice to refer to each article by its Part number and its article number, i.e. I-60 or IV-448. References to Parts I, II, III and IV, as well as to the numbered articles, are found throughout this treatise.

2. PART I: UNTITLED[157]

Part I is apparently intended as an overview of the European Union. Such a feature was absent in the Treaties, and this introduction may reflect the desire for a "basic treaty" as referred to in the Laeken Declaration. Part I consists of 60 articles in nine titles:

> Title I—Definition and Objectives of the Union.[158] These eight provisions create the Union, grant it legal personality, affirm the primacy of EU law over Member State law, and identify the Union's values and objectives, while acknowledging respect for the integrity of the Member States.
>
> Title II—Fundamental Rights and Citizenship of the Union.[159] This brief section of two articles describes the EU's commitment to human rights and presages the Charter of Fundamental Rights in Part II of the Constitution. It also creates and defines EU citizenship.
>
> Title III—Union Competences.[160] Clearly responding to a demand in the Laeken Declaration, these eight articles define what the EU may do, both in terms of its exclusive competences and with regard to competences shared with the Member States. These are critical concepts, on the one hand confirming Union authority and on the other hand underscoring that powers not specifically conferred to the EU are reserved to the Member States.
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> Title IV—The Union's Institutions.[161] In straightforward terms, these 14 provisions describe the institutions, their composition and their responsibilities. Correcting an omission in the Treaties, the European Council is for the first time formally identified as an EU institution.[162] The new positions of a permanent European Council

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[157] Constitution arts. I-1 to I-60.
[158] Constitution arts. I-1 to I-8.
[159] Constitution arts. I-9 to I-10.
[160] Constitution arts. I-11 to I-18.
[161] Constitution arts. I-19 to I-32. In the Constitution the European Council is always referred to with its full name, while in all provisions after Article I-19, the Council of Ministers is referred to as the "Council" and the European Commission is referred to as the "Commission." See Constitution art. I-19(1). This treatise generally follows those usage conventions.
[162] Constitution arts. I-19, I-21.

President and Union Minister for Foreign Affairs are established.[163] Groups of three Member States will share presidencies of the Council for eighteen months, rather than rotating to a single State every six months,[164] and the Commission will be reduced in size to less than one commissioner per Member State.[165] This title also includes the controversial new formula for qualified majority voting on the European Council and Council.[166]

Title V—Exercise of Union Competence.[167] Significantly simplifying the Treaties, these 12 articles reduce the number of EU legal instruments to six—European laws, European framework laws, European regulations, European decisions, recommendations and

[163] Constitution arts. I-22, I-28.

[164] Constitution art. I-24(7). Note that each of the three countries would chair all configurations of the Council (except Foreign Affairs) for a period of six months within the 18-month term. Draft Decision of the European Council on the Exercise of the Presidency of the Council of Ministers, Meeting of Heads of State or Government, Brussels, June 28, 2004, O.J. (C 310) 420, Annex 8, art. 1 [hereinafter Draft Decision]. Arguably, this is not significantly different from the current system, in which the immediate past-president and the upcoming president coordinate with the current president. The participation of the same three Member States for the full 18-month term might well have offered a greater measure of consistency and coordination than is currently the case, but the complete replacement of the team every 18 months might also have proven disruptive.

[165] The first Commission appointed under the Constitution would consist of one commissioner per Member State. Constitution art. I-26(5). After that full five-year term, the size of the body would be a number corresponding to two-thirds of the Member States, selected on the basis of equal rotation among the States. Constitution art. I-26(6).

[166] The Constitution's QMV formula represents a departure from the weighted voting formulas inserted into the EC Treaty through the Treaty of Nice. EC Treaty art. 205. The formula proposed by the Convention was a majority of Member States representing three-fifths of the EU population, but this had been blocked by Spain and Poland at the December 2003 meeting of the Intergovernmental Conference. Thomas Fuller, supra note 108, at 1. The IGC meetings of June 2004 revised the formula to give greater voice to the smaller states. The final version would require the votes of 55% of Council Members, representing at least 15 Member States and comprising at least 65% of the EU population. Constitution art. I-25(1). In addition a "blocking minority" would be required to include representatives of at least four Member States. Id. In certain instances the voting requirement is 72% of Council members representing at least 65% of the Union population. Constitution art. I-25(2).

[167] Constitution arts. I-33 to I-44.

opinions.[168] This title describes which institution may adopt these measures, and it describes the procedures for such activity. An important procedural development is that legislative co-decision by the European Parliament becomes the norm.[169] Furthermore, several provisions provide specific guidelines for Union action in common foreign and security policy, common defense and cooperation in freedom, security and justice.[170] A final article in this section contains procedures for enhanced cooperation among groups of Member States in circumstances in which the entire Union is unable to act.[171]

Title VI—The Democratic Life of the Union.[172] These eight provisions respond to demands for more trappings of democracy within the EU. They demand equality for all EU citizens and guarantee openness and transparency in the workings of the Union's institutions. The varied articles include a right of citizen initiative, the work of a European Ombudsman, protection of personal data, and Union respect for the status of churches and other organizations under national law.

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[168] Constitution art. I-33. The Constitution's forms of legislation are similar to the five types currently provided under Article 249 of the EC Treaty, with the addition of "European regulations" as a new form of action. EC Treaty art. 249. See discussion in Chapter 14.

[169] The Constitution would expand the areas of co-decision from 37 to approximately 80 subjects. Valery Giscard d'Estaing, Oral Report Presented to the European Council in Thessaloniki, June 20, 2003, SN 173/03, at 11, available at http://european-convention.eu.int/docs/speeches/9604.pdf. This increase would be created through Article I-34(1), which provides that "European laws and European framework laws shall be adopted, on the basis of proposals from the Commission, jointly by the European Parliament and the Council under the ordinary legislative procedure as set out in Article III-396." Constitution art. I-34(1). Thus the Constitution would expand co-decision by including it as part of the normal legislative process, as opposed to an article-by-article amendment of substantive treaty provisions.

[170] Constitution arts. I-40 to I-43. Activities relating to the common foreign and security policy (the TEU's Second Pillar) and cooperation and justice in home affairs (Third Pillar) are currently subject to their own types of legislation, such as "common strategies," "joint actions," and "common positions" in the Second Pillar, and "common positions," "framework decisions," "decisions," and "conventions" in the Third Pillar. TEU arts. 13–15, 34. Under the Constitution, these types of legislative activity in theory would be carried out within the same six categories as all other forms of EU legislation. However, see comments in Chapter 14.

[171] Constitution art. I-44.

[172] Constitution arts. I-45 to I-52.

Title VII—The Union's Finances.[173] A concise summary of the EU's budgetary system and processes is presented in four articles.

Title VIII—The Union and its Immediate Environment.[174] This is a single provision that calls for the EU to establish close relationships with neighboring states.

Title IX—Union Membership.[175] These three provisions deal with accession to the EU, suspension of the rights of a Member State that violates the Union's core values and voluntary withdrawal of a State from the Union. The articles on accession and suspension have antecedents in the Treaties,[176] while the provision on withdrawal is unprecedented.

3. PART II: THE CHARTER OF FUNDAMENTAL RIGHTS[177]

This part of the Constitution incorporates the Charter that had previously been adopted as a "solemn proclamation" of the EU, but was not included in the Treaties.[178] Part II consists of its own Preamble and 54 concise articles that are divided into titles designated as Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. With the inclusion of the Charter in the text of the Constitution, the European Union will finally have a bill of rights at the core of its legal system.

4. PART III: THE UNION'S POLICIES AND FUNCTIONING[179]

The longest part of the Constitution with 322 articles, Part III incorporates much of the text of the EC Treaty and TEU. It contains considerable detail on the internal market, social, economic and monetary

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[173] Constitution arts. I-53 to I-56.
[174] Constitution art. I-57.
[175] Constitution arts. I-58 to I-60.
[176] TEU art. 49 (regarding accession); TEU art. 7, EC Treaty art. 309 (regarding suspension of rights).
[177] Constitution arts. II-61 to II-114.
[178] Charter of Fundamental Rights of the European Union, Dec. 18, 2000, O.J. (C 364) 1, 5 [hereinafter Charter of Fundamental Rights]. For an analysis of the Charter and its background, see Giorgio Sacerdoti, The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens' Europe, 8 Colum. J. Eur. L. 37 (2002). Also see discussion in part 3 of Chapter 7.
[179] Constitution arts. III-115 to III-436.

policy, external action and the competences of the EU institutions. The following is a summary of its seven titles:

> Title I—Clauses of General Application.[180] These eight provisions express general operating principles and objectives for the Union.
>
> Title II—Non-Discrimination and Citizenship.[181] This brief section of seven articles restates certain civil rights of EU citizens, such as the rights to move and reside freely within the Union. Concepts of equality and non-discrimination are also reiterated.
>
> Title III—Internal Policies and Action.[182] One of the most substantial sections in the Constitution, this title consists of 156 articles, divided as follows: Chapter I on the internal market, including competition law; Chapter II on economic and monetary policy; Chapter III on certain specific areas such as employment, social policy, agriculture, environment, consumer protection, transport and energy; Chapter IV on border policies, immigration, asylum and police and judicial cooperation; and Chapter V on areas in which the EU may take action complementary to that of the Member States, including public health, industry, culture, education and civil protection.
>
> Title IV—Association of the Overseas Countries and Territories.[183] This brief section of six articles contains special provisions governing the relationship between the Union and the overseas countries and territories of several Member States.
>
> Title V—The Union's External Action.[184] Various external matters have been consolidated into this section, whose 38 articles are divided into eight chapters. Most notably, the chapters cover the TEU's Second and Third Pillars, relating to a common foreign security policy (including defense) and police and judicial cooperation in criminal matters. Other subjects include a common trade policy, restrictive trade measures, humanitarian aid, the EU's

[180] Constitution arts. III-115 to III-122.
[181] Constitution arts. III-123 to III-129.
[182] Constitution arts. III-130 to III-285. See discussion in Chapter 17.
[183] Constitution arts. III-286 to III-291.
[184] Constitution arts. III-292 to III-329. See discussion in Chapter 17.

conclusion of international agreements and joint responses to terrorist attacks or disasters.

Title VI—The Functioning of the Union.[185] Another lengthy section, the 94 articles of this title are divided into three chapters. Chapter I contains detail on the EU institutions and advisory bodies, most of which was imported from the EC Treaty. Chapter II governs the Union's budget and multi-annual financial framework. Chapter III offers details about enhanced cooperation among groups of Member States.

Title VII—Common Provisions.[186] A final section of 13 articles deals with certain capacities of the Union and rights of the Member States, as well as several miscellaneous provisions.

5. PART IV: GENERAL AND FINAL PROVISIONS[187]

The final part of the Constitution's text consists of 12 varied articles that deal with subjects such as the repeal of the EC Treaty and TEU, the continuity of the EU and its succession to the rights and obligations of the European Community. Procedures are described for the Constitution's ratification and entry into force, and there are provisions governing future amendments to the document.[188]

[185] Constitution arts. III-330 to III-423.
[186] Constitution arts. III-424 to III-436.
[187] Constitution arts. IV-437 to IV-448.
[188] The standard amendment procedure would require a new convention or an intergovernmental conference, plus eventual ratification by all Member States. Constitution art. I-9. More streamlined procedures, not requiring a convention or IGC, were proposed for changing unanimous voting requirements or special legislative procedures in Part III and revising internal Union policies in Part III. Constitution arts. IV-444, IV-445. See discussion in Chapter 11.

Chapter 4

An Overview of the Constitutional Treaty's Significant Innovations

Before we proceed with our detailed examination in Parts Two, Three and Four of this treatise, it is appropriate to offer an additional overview of the Constitution. This chapter will provide a brief summary of the major points on which the Constitution would have changed the Treaties, and it will attempt to answer the question: In a nutshell, what would the Constitution do? This capsule description will be followed in Chapter 5 by another summary, one that illustrates how the Constitution defines the role of the Member States within the Union. In the course of these descriptions we identify the principal dividing lines between the EU and the states. Chapter 6 continues our introduction to the dividing lines, offering a brief summary of how and where the Constitution would have caused those lines to shift from their positions under the Treaties. As we continue beyond Part One and into the heart of this treatise, these three chapters will contribute a "big picture" perspective to help us maintain our bearings in the sea of details that lies ahead. Also, since these chapters serve as introduction to the remainder of the treatise, the discussion will include references to the corresponding treatments in later chapters.

The significant changes relating to the essential character of the EU have already been described at the end of the Introduction to this treatise. The Constitution would have repealed the EC Treaty and TEU, it would have created a new European Union with legal personality, and it would have scraped the Pillar structure. It also would have declared the primacy of EU law over national law. It bears the name "constitution" rather than "treaty." It is suggested that all of these factors might have resulted in the creation of a new legal order for Europe.

In terms of the structure of the treaty text, the principal changes embodied in the Constitution are its Part I and Part II. Part I contains an unprecedented overview of the Union and its competences, while Part II incorporates for the first time the Charter of Fundamental Rights of the Union. Part III may be seen as largely a carryover of the provisions of the EC Treaty and TEU, although it contains a number of new policies in matters of substantive activity. Part IV contains the requisite technical and general articles, some of which are innovative.

1. PART I – AN APPROACHABLE OVERVIEW, AND MORE

Taken alone, Part I[189] in its nine Titles offers a substantial contribution to making the European Union more understandable. Its provisions introduce the EU and its institutions in a straightforward and clear manner, and some of its articles give substance to concepts that were at best implied in the Treaties. It should also be noted that in Part I, as well as in the preambles to the Constitution and to Part II, there are lofty statements of aspiration and intent that are worded differently than in the Treaties. The differences are analysed in Chapter 7, but the substantive importance of such statements would likely be subtle.

Title I[190] defines the Union, its values and objectives and its essential relationship with the Member States. It affirms the court-developed principle of primacy of EU law over Member State law, and it cures an omission in the Treaties by endowing the Union with legal personality and legal capacity. It also places new emphasis on the Member States by recognising their equality as states and calling upon the EU to treat the states with "full mutual respect" and "sincere cooperation." Title II[191] affirms EU citizenship and the basic rights attendant to it. Title III[192] offers the clearest statement yet attempted in any of the Treaties as to the source of EU competences (stating that they are conferred by the Member States), the categories of these competences and how they relate to the authority reserved to the Member States. Containing a novel delineation of subjects as exclusive to the EU, shared between the EU and the Member States, or areas in which the EU may take only supporting, coordinating or complementary action, these provisions constitute an ambitious attempt to clarify the role of the Union institutions vis-à-vis the Member State governments. Also in this Title is the Constitution's flexibility clause, Article I-18, which expands on its EC Treaty counterpart by

[189] Constitution arts. I-1 to I-60.
[190] Constitution arts. I-1 to I-8.
[191] Constitution arts. I-9 to I-10.
[192] Constitution arts. I-11 to I-18.

broadening the subject areas in which the EU may act without specific constitutional authorization. The basic characteristics of the EU, corresponding somewhat to the subjects of Titles I to III, are analysed in Chapters 7 – 12 of this treatise.

Title IV[193] provides a useful snapshot of the EU institutions, although it must be noted that these introductory sections cannot be read without referring to much more extensive institutional provisions in Part III of the Constitution. Recognition of the European Council as an EU institution is unprecedented, as is the creation of a permanent (non-rotating) European Council Presidency. Other significant developments are the redefinition of a qualified majority for the Council and European Council, the creation of the post of Minister of Foreign Affairs, a change in the system of rotating Council presidencies, the general grant of budgetary approval to the European Parliament and the planned reduction in size of the Commission. The EU institutions are examined in detail in Chapter 13.

Title V[194] provides for a simplification of the various legal instruments available to the EU and offers an explanation of how they are to be employed. These provisions manifest a boldness and level of innovation akin to Title III, and in so doing they would effectively eliminate the scheme of the Treaties that utilised different types of legal acts for EU activities falling within the different Pillars. Title V also solidifies the legislative role of the European Parliament by making co-decision the ordinary procedure.[195] Principles and procedures relating to EU law-making are analysed in Chapter 14.

Title VI[196] enshrines for the first time a clear statement of how democracy is to be offered within the EU system to citizens of the Union. New developments include greater emphasis on transparency, including open meetings on the Council and greater access to EU documents. The Union institutions must maintain dialogue with citizens and representative associations, and the EU must respect the national status of churches and similar groups. The most innovative of these "democracy" provisions creates a citizen initiative process. Title VII,[197] relating to the EU's finances, reiterates principles found in the Treaties, but institutes for the first time a

[193] Constitution arts. I-19 to I-32.
[194] Constitution arts. I-33 to I-44.
[195] Constitution art. I-34(1).
[196] Constitution arts. I-45 to I-52.
[197] Constitution arts. I-53 to I-56.

multiannual financial framework for the Union. Title VIII[198] is a single section that offers a new emphasis on the EU's relationships with its neighboring states. Title IX[199] perpetuates basic principles relating to EU membership, but it also introduces the novel concept of a straightforward right for any Member State to withdraw from the Union. The subjects of Titles VI through VIII are analysed at various points in Chapters 8 and 9. Withdrawal from the Union is examined in Chapter 10.

2. PART II – CONSTITUTIONALISING FUNDAMENTAL RIGHTS

The inclusion of the Charter of Fundamental Rights of the Union as Part II of the EU Constitution[200] was a significant development, even though all of the Member States had previously adopted the Charter's text as a political commitment through the European Council. The full impact of placing these rights in the constituent Union document was not clear, but under the Constitution the EU would have been subject to these sweeping rules respecting human rights. The Charter is further discussed in Chapter 7.

Related innovations are the requirements of Constitution Article I-9 that the Union must (1) accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and (2) adhere to the "constitutional traditions common to the Member States" respecting fundamental rights.[201] These concepts, coupled with the inclusion of the Charter's text as Part II of the Constitution, display both a serious dedication and a complex approach to fundamental rights. This represents a dramatic shift in emphasis from the Treaties.

3. PART III – A VARIETY OF NEW POLICIES

At the outset it should be noted that all areas of Part III[202] are affected by the following innovations in Part I: (1) clarifications as to the Union's competences, (2) simplification in the number of legislative instruments available, and (3) the re-defined ordinary legislative procedure. On the substantive side, Part III also offers a number of developments, described below, but it is noteworthy that the most visible areas of EU activity, the internal market and economic and monetary union, have been changed very little. The primary areas of substantive change are as follows:

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[198] Constitution art. I-57.
[199] Constitution arts. I-58 to I-60.
[200] Constitution arts. II-61 to II-114.
[201] Constitution art. I-9.
[202] Constitution arts. III-115 to III-436.

Space[203] and energy policy[204] would be added to the list of "policies in other areas" (i.e., beyond the internal market and economic and monetary policy) in which the EU is permitted to act.[205] Areas in which the EU may take supporting, coordinating or complementary action[206] would be expanded to include tourism,[207] sport,[208] civil protection,[209] administrative cooperation[210] and certain aspects of public health.[211] In addition, the Union would be permitted create an EU system of intellectual property rights.[212]

The area of freedom, security and justice[213] is consolidated from provisions taken from the TEU (Third Pillar)[214] and the EC Treaty.[215] Its scope is expanded somewhat, and it would be subject to the ordinary forms of legislative instrument. Furthermore, there is a pronounced move to more qualified majority voting on the Council in this field, and the jurisdiction of the European Court of Justice would be significantly extended.

In the field of external action,[216] the Union's scope of activity is clarified to a considerable extent, beginning with a specific set of objectives for the EU's external relations[217] and an overall delineation of Union competences.[218] The common foreign and security policy[219] would be transformed from a distinct Second Pillar activity to an EU program that is subject to normal legislative procedures and instruments, including a certain measure of qualified majority voting on the Council of Ministers. The

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[203] Constitution art. III-254.
[204] Constitution art. III-256. Energy is mentioned as a Community activity in Article 3(u) of the EC Treaty, but no separate provision is made for legislation in the field.
[205] Constitution arts. III-203 to III-256.
[206] Constitution arts. III-278 to III-285.
[207] Constitution art. III-281. Tourism is mentioned in EC Treaty Article 3(u) as a Community activity, but there is no separate section calling for legislation or action in the field.
[208] Constitution art. III-282.
[209] Constitution art. III-284.
[210] Constitution art. III-285.
[211] Constitution art. III-278.
[212] Constitution art. III-176.
[213] Constitution arts. III-257 to III-277.
[214] TEU arts. 29-42.
[215] EC Treaty arts. 61-69.
[216] Constitution arts. III-292 to III-329.
[217] Constitution art. I-3(4).
[218] Constitution arts. I-11 to I-18.
[219] Constitution arts. III-292 to III-313.

jurisdiction of the European Court of Justice would be extended into certain aspects of the CFSP. The common security and defence policy[220] would likewise be removed from the Second Pillar, and it would be clarified in a number of ways. Its provisions for an EU operational capacity, a European Defence Agency and structured cooperation within the EU framework are novel.[221] Other innovations include a provision relating to EU humanitarian aid,[222] greater detail on how the Union may enter into international agreements,[223] and a solidarity clause.[224]

The internal activities and external action of the EU are analysed in Chapter 17.

4. PART IV – A NEW UNION; NEW AMENDMENT PROCEDURES

The most significant structural innovation in Part IV[225] is the consolidation of the European Community and the European Union into a successor European Union. This would clean up an awkward and unnecessary dual personality that had been created with the adoption of the Maastricht Treaty.

Also worthy of note is the introduction of simplified procedures in Articles IV-444 and IV-445 by which the Constitution may be amended. However, these procedures would require unanimous Member State approval at some stage, in the form of a vote of the entire European Council, acquiescence by all national parliaments of the Member States, or ratification by all of the Member States. The new amendment procedures are supplemented by several other *passerelle* or "bridging" provisions in the Constitution that would permit the European Council to shift voting on the Council from unanimity to QMV. The European Council would be required to act unanimously to make these changes, but Member State ratification would not be required for what might be characterised as the equivalent of amending the Constitution. The bridging provisions, which have no precedent in the Treaties, are (1) Constitution Articles I-40(7) and III-300(3), which permit additional QMV to be instituted in the common foreign and security policy; (2) Constitution Article I-55(2), which permits additional QMV in relation to the EU's multiannual financial framework; (3) Constitution Article III-269(3),

[220] Constitution arts. III-309 to III-312.
[221] Constitution arts. I-41, III-311.
[222] Constitution art. III-321.
[223] Constitution arts. III-323 to III-326.
[224] Constitution art. III-329.
[225] Constitution arts. IV-437 to IV-448.

which permits additional QMV decision-making in certain matters of family law with cross-border implications; and (4) Constitution Article III-422, which permits additional QMV or a change in legislative procedure (participating Member States only) within a program of enhanced cooperation.[226] A detailed examination of the amendment procedures may be found in Chapter 11.

5. GENERAL COMMENT ON THE STRUCTURE

The Constitution may be fairly criticised for containing too much detail and for spreading the detail around, for example, in parallel sections in Part I and Part III. This critique and others are elaborated in Chapter 18. Nevertheless, the Constitution is easier to navigate than the EC Treaty and the TEU. Peter Norman has appropriately described the Constitution as "a huge advance on the existing jumble of treaties," adding that it "is a text with a beginning, a middle and an end that an ordinary mortal can follow and that result far outshines anything produced by the two most recent intergovernmental conferences that culminated in the treaties of Amsterdam and Nice."[227] The improved layout of the Constitution must be seen as one of its significant overall changes.

[226] Constitution art. III-422(1), (2).
[227] Norman, supra note 152, at 326-27.

Chapter 5

How the Constitutional Treaty Identifies the Dividing Lines

This chapter will offer an overview of how the Constitution articulates the dividing lines between the EU and its Member States. This analysis serves as a preview of Parts Two, Three and Four (Chapters 7-17) of this treatise, first in a brief introduction and then in a more formal outline.

It is important to note that the analysis in this chapter and in the remainder of this treatise does not follow the order of provisions in the Constitution. It would have been possible to do so, beginning with Article I-1 of the constitutional text and proceeding in sequence to Article IV-448. But such an approach would not prove very useful in the pursuit of a particular theme such as the EU's dividing lines. Rather, it has been more suitable to arrange the material as the subject itself suggests. In examining the division of competences between a central government and its constituent member states there will be, of course, many possible analytical frameworks, and no choice of approach is necessarily better than the alternatives. The organisation of this treatise was selected as a result of stepping back for a broad view of the European Union and posing a series of logical questions:

What kind of entity is the EU? This question is so basic to the analysis that it was addressed in Chapter 1. The theme of that chapter is that the Union's construct blends federal elements with structural components of an intergovernmental organisation. We also noted that the Union is not static; rather, it has evolved and continues to do so. From those conclusions and the other background material in Chapter 2 we proceed to our additional questions.

Beyond its structural nature, what is the basic character of the EU? This question is examined in Part Two (Chapters 7-12). The initial focus, in

Chapter 7, is on the expressed values on which the Union is founded, and second on the concrete objectives for Union activity. With regard to values, we examine how and where they are stated. We examine whether they reflect a shared European point of view, whether there is pressure for full conformity among the Member States and whether there is room for any difference of opinion within the Union. We also inquire as to whether these stated values are aspirational only, or whether they carry the force of law. The second aspect of the EU's character is how its stated values are translated into concrete objectives for Union activity. We observe that certain of the objectives are practical, such as creating and managing the internal market. Others are more elusive, such as elimination of discrimination and the promotion of human rights.

What means are provided to the Union to enable it to pursue its objectives? Chapter 8 examines the attributes of the Union that permit it to function as a quasi-state. As an entity it is granted legal status, and the relationship between that characteristic and the separate legal status of the Member States is explored. The citizens of the Member States are granted a supplemental EU citizenship, which places them into a direct relationship with the Union. The Union possesses a measure of budgetary autonomy. It is empowered to act on matters internal to the geographic boundaries of its Member States, but also externally. Lastly, the EU is constituted with a sophisticated set of legislative, executive and judicial institutions that permit it to function much in the manner of a national government.

In its activities will the EU be accountable to its citizens? Bearing in mind the debate in Chapter 1 as to whether the Union is "merely" an intergovernmental organisation or whether it is more federal in nature, in Chapter 9 we explore whether the EU is or should be democratic in its institutions and procedures. If the IGO characteristics are dominant, then it might be argued that the Union's accountability is merely to the governments of the Member States. But it is quite clear that the scope of Union activity directly affects the individual citizen in profound ways. Thus, there is a deep-seated expectation that something akin to national level democratic processes be offered at the EU level. The analysis explores how these democratic elements are infused into the EU's institutions and activities.

How can the EU adapt to new challenges and opportunities? The first 50 years of the Union have seen rapid change in technology, lifestyle, attitudes and expectations. The EU has adapted to changing times, and it must not remain static. Chapter 10 examines how the Union will be able to facilitate "widening and deepening" – the accession of more Member States and the expansion of EU activity into new fields. Flexibility is the key, and

mechanisms for change are explored. At the same time, it is inevitable that the constituent documents of the Union will need periodic amending to permit new forms or levels of action to be taken. Chapter 11 explores the amendment requirements and the small steps proposed in the Constitution to simplify the process.

On a more technical level, what principles govern how EU action is carried out? The final topic in Part Two is the examination in Chapter 12 of a series of legal concepts that govern EU lawmaking and other activity. These concepts include conferral, subsidiarity, primacy, exclusivity and others, and they represent a series of carefully crafted political decisions that have a profound impact on how the Union functions. Any analysis of the basic character of the EU would be incomplete without these technical, but highly significant details.

After setting the stage in Parts One and Two, the analysis proceeds to the actual structure and operation of the EU – its institutions and how they create Union law. These subjects are addressed in Part Three. Chapter 13 examines the primary EU institutions and how they reflect the Union's carefully drawn dividing lines, while Chapter 14 describes the processes of EU lawmaking and administration. Chapter 15 explores the critically significant role of decisional requirements for the Council of Ministers, whether unanimity is mandated or whether a qualified majority is sufficient. Finally, we can turn to the actual subjects of EU activity, which we address in Part Four. Chapter 16 examines the Area of Freedom, Security and Justice, in which the Constitution's most dramatic procedural changes are presented. Chapter 17 then reviews a variety of less significant developments relating to the EU's internal activities and external action.

Utilising the methodology just described, we are able to understand the attributes and competences of the European Union, as well as how it relates to the Member States that have created it. This approach is indeed consistent with the thrust (if not the outline) of the Constitution. The primary purpose of the document was to establish the Union and decree what it is empowered to do. However, as we proceed with our analysis we are struck by the fact that in many instances in which the Constitution describes the EU, it counterbalances those descriptions with explicit reminders of the powers reserved to the Member States. In other words, the Constitution's text displays many of the EU's the dividing lines and in many instances with considerable emphasis.

For the sake of brevity in the remainder of this chapter, attributes of the Union as expressed in the Constitution will be briefly noted, followed by examples of how the Member States are brought into the equation. When these same subjects are addressed in detail in Parts Two, Three and Four, the analysis will also compare the constitutional provisions with their predecessor articles, if any, in the Treaties. Citations are omitted in this chapter, but they are abundant in the ensuing analysis.

1. THE CHARACTER OF THE EU (Treatise Part Two)

1.1 **EU values and objectives; Member State values and traditions** (Chapter 7)

The Constitution identifies a number of values underlying the European Union and its activities, such as equality, democracy and the rule of law. The Union's institutions are mandated to adhere to these values. At the same time, the Constitution notes that the EU's values are common to and derive from the Member States. Recognition is also paid to the "peoples" of Europe and the diversity of cultures and traditions in the states. The EU is required to respect the status of churches and other such organisations under national law. The EU's new motto is "united in diversity," and the Constitution drops the goal of "ever closer union" that was expressed in the Treaties.

Springing from the Union's values are an extensive and broad set of objectives for the EU. These include the fostering of prosperity, progress and peace, as well as promotion of human rights. In fact, nearly all EU activities, including those relating to the internal market and to external relations, are mentioned in sweeping terms as Union objectives. Both the EU institutions and the Member States are mandated to promote the Union's values and pursue its objectives. Particular emphasis is placed on the fact that the Union's authority to pursue its objectives derives from the competences conferred on it by the Member States.

Perhaps because of the inclusion of the Charter as Part II of the Constitution, much emphasis is placed on human rights as a Union value, with the protection of such rights as a significant objective for the EU. Outside Part II there are numerous other textual references to individual rights. Nevertheless, this is not a field reserved for the EU. Rather, the Constitution contains many references to rights as recognized by Member State laws and traditions. For example, the provisions of Part II mention respect for national laws in regard to education, conduct of business, workers' rights, social

security and social assistance, health care, and access to services of general economic interest. In general terms, the EU must respect the Member States' human rights traditions, the Charter must be interpreted in harmony with those traditions, and the Charter may not be interpreted as restricting rights recognised in Member State constitutions. The Constitution even notes, somewhat curiously, that the inclusion of the Charter is not intended to extend the scope of Union law.

1.2 **The EU's state-like attributes; respect for the Member States** (Chapter 8)

a. The legal character of the EU; the identity of the Member States

As a functioning organisation with powerful institutions and wide-ranging activities, the European Union in many ways resembles a nation state. The Constitution reaffirms the Union's state-like attributes, granting it legal personality, privileges and immunities and legal capacity. The EU possesses symbols such as a flag, an anthem and a currency. Under the Constitution the Union is a permanent entity, the successor to the EU and the European Community that were created by the Treaties.

Under the Constitution the European Union is required to respect the equality of the Member States, their national identities and their essential state functions. The EU must also treat the Member States with full mutual respect and deal with them in sincere cooperation. It must respect the cultural and linguistic diversity within Europe. The EU must promote solidarity among the Member States, and its institutions must serve the interests not only of the Union, but those of the Member States as well. In its capacity as a legal entity, the EU can acquire property under Member State law and be a party to legal proceedings under Member State law. Tort claims against the Union are to be made in accordance with principles common to the laws of the Member States.

b. Citizenship of the Union; national citizenship

As under the Treaties, citizens of the Member States are granted EU citizenship, pursuant to which they possess certain rights to reside, work and even vote in other Member States. However, EU citizenship is specifically supplemental to Member State citizenship and does not replace it. National law retains the primary responsibility for citizens' rights, and for example, when a citizen of one Member State votes in another Member State, he or she is bound by the conditions of local election laws.

c. The Union budget; Member State input

The EU is granted budgetary independence, manifested in its own revenue stream and its authority over its expenditures. However, this is tempered considerably by the fact that many critical decisions relating to the budget require unanimous Council approval, and in some instances approval by the parliaments of the Member States, thus affording each state the opportunity to strongly assert itself in the budgeting process. A unanimous vote of the Council is also required to approve a law setting the multiannual financial framework of the Union.

d. The EU's external action; limitations

The Union is empowered to carry out a wide array of activities in external affairs, but, as elaborated below and in Chapter 17, its authority is carefully contained. Each Member State retains a significant measure of competence to manage its own foreign affairs.

e. The institutions of the Union; respecting the Member States

The EU is manifested in a variety of institutions that carry out the Union's work and pursue its objectives. These institutions to a great extent mirror the institutional framework of a nation. However, beyond the mandate for the institutions to manage the Union, the Constitution requires them to respect the Member States and serve their interests. The institutions are reminded to always adhere to the principles of subsidiarity and proportionality, thus protecting local interests where appropriate. The individual institutions are discussed in detail later in this chapter and in Chapter 13.

1.3 **The EU as a democracy; democracy in the Member States** (Chapter 9)

The Constitution requires the Union to adhere to democratic principles in its procedures and activities. EU citizens are to be treated equally, but they are also granted participatory rights through the European Parliament and through a new initiative process. EU decisions are to be taken openly, and the public right of access to Union documents is expanded. The Constitution's provisions on democracy within the EU are emphasised more strongly than their counterparts in the Treaties, but despite this emphasis the democratic legitimacy of the Member States is in no way diminished.

Members of the European Council and Council of Ministers are democratically elected representatives of their separate national constituencies, and the Constitution assumes that each of the Member States will fully maintain its own democratic traditions.

1.4 **The EU as a flexible entity; Member State autonomy** (Chapter 10)

One of the more pronounced characteristics of the European Union is the fact that it has steadily expanded and is likely to continue in its growth. But its flexibility has other manifestations. Under the Constitution a Member State may withdraw from the Union if it so chooses. In addition, there is the possibility for groups of Member States to engage in enhanced cooperation by themselves, and for individual states to opt out of Union activities such as the common currency. All of the foregoing may be seen as positive flexibility on the part of the EU, but they also underscore the fact that the Member States retain a substantial amount of autonomy despite their Union membership.

1.5 **Amending the Constitution; the impact of the unanimity requirement** (Chapter 11)

The Constitution, like its predecessor Treaties, could be amended only upon ratification by all of the EU's Member States, each in accordance with its own constitutional requirements. An innovation in the Constitution is that it provides for certain simplified amendment procedures, one of which avoids the ratification process. However, even if ratification is not necessary, there is the right of a national parliament to object and a veto right by any member of the European Council. Regardless of the procedure followed, full consensus must be reached among the Member States, and this fact emphasises the continuing sovereignty of the states as full treaty partners.

1.6 **Principles underlying EU action; emphasis on the Member States** (Chapter 12)

The critical principles that guide all EU activity are tied in various ways to the separate identity and competence of the Member States. Union competences arise by *conferral* from the Member States, and competences not conferred in the Constitution remain with the states. The *exclusivity* of EU competence in certain areas is balanced by the fact that its competence in other areas may be shared with the Member States or limited to supporting, coordinating or complementing national activity. The principles of *subsidiarity* and *proportionality* are specifically intended to limit the scope of Union activity, leaving for the Member States those activities that can be

effectively dealt with at the national level. The *flexibility* given to the EU to act in areas not specifically provided for in the Constitution is tempered by the fact that any such action must be unanimously approved by the Council and may not entail harmonisation of national law if the Constitution otherwise restricts harmonisation. The *primacy* of EU law over Member State law is tempered by the implied principle that such law must be authorised under the Constitution to be legally effective, and by the practical effect that implementation and administration of Union law is often left to the Member States.

2. INSTITUTIONS AND DECISION-MAKING IN THE EU (Treatise Part Three)

2.1 **The EU institutions; the involvement of the Member States** (Chapter 13)

European Union institutions do not exist in a vacuum. Rather, they are in many ways representative of or reflective of the Member States, and decisions as to their make-up and authority may be subject to agreement by all of the states.

The seat of all institutions is subject to the common accord of the Member State governments. Their operating languages are subject to unanimous decisions by the Council. The composition of the European Parliament is to be decided by a unanimous vote of the European Council. The system for electing Parliament and rules governing the activities of parliamentarians are to receive unanimous approval by the Council. Members of the European Council represent their respective Member States, and this body must normally act by consensus, thus giving each state a veto on decisions. Members of the Council of Ministers also represent their respective Member States. A Council member is empowered to commit his or her government and cast its vote. The presidency of most Council formations is to be assigned on the basis of equal rotation among the Member States.

Under the Constitution, until the end of the first full five-year Commission term commencing after the Constitution takes effect, the body will continue to be composed of one commissioner per Member State. Thereafter, the size of the Commission will reflect two-thirds of the Member States, and unanimous votes of the European Council or Council will be necessary to change the body's size and set its rotation. In any event, after appointment the commissioners will be required to act without instruction or influence from their national governments.

The European Court of Justice and Court of Auditors are comprised of one judge per Member State, each being proposed by a Member State. The Court's jurisdiction is exclusive only to the extent the Constitution so states; in other cases the courts of the Member States will have concurrent jurisdiction. The Governing Council of the European Central Bank includes the governors of the national central banks of the euro-zone Member States, although such governors and the Governing Council are to be independent of influence from the Member States. The members of the European Investment Bank are the Member States themselves. Members of the Union's two advisory committees, the Economic and Social Committee and the Committee of the Regions, are proposed by the Member States and unanimously agreed by the Council.

2.2 **Unanimous voting on the Council; the veto power** (Chapter 15)

As previously noted, the unanimity requirement for certain Council decisions affords each Member State the possibility to exercise a veto over the matter. Chapter 15 and the **Addendum** examine in detail the subjects for which unanimity, consensus or common accord may or may not be required.

3. SUBSTANTIVE AREAS OF EU ACTIVITY (Treatise Part Four)

In specific matters of EU activity, numerous protections for the positions of the Member States may be found in the Constitution. First and foremost, such protections are set forth in Article I-12 of the document, which describes the EU's competences in three primary categories: (i) exclusive, (ii) shared, and (iii) supporting, coordinating or complementary. In matters of exclusive competence, only the Union may act unless it specifically empowers the Member States to do so. In areas of shared competence, the Member States are free to act on their own if the EU decides not to. In areas of supporting, coordinating or complementary EU action the Union's role is limited, and its activities may not supersede those of the Member States. Additional safeguards in specific areas are discussed below.

It is important to note that the following descriptions do not include the many instances in which a unanimous vote of the Council or European Council (or consensus or another form of unity) may be required to approve a particular law or adopt a particular decision. These are addressed in Chapter 15 and the **Addendum**. Unanimity carries with it an obvious protection for each Member State, and the ramifications of unanimous voting are addressed at many points in this treatise.

3.1 **The Area of Freedom, Security and Justice; expanded EU activities, but a role for the Member States** (Chapter 16)

With the Constitution's abandonment of the Pillar structure, all AFSJ activity would take place under the ordinary procedures of the Union and with the use of the new set of legislative instruments. The dramatic result is that virtually all decisions would be subject to qualified majority vote of the Council, rather than unanimity as under the TEU.

Despite this significant development, certain EU action in the area AFSJ is marked for particular attention by the national parliaments of the Member States. Also, notwithstanding the need for EU policies on border controls, asylum and immigration, the Constitution emphasises that the Member States retain competence to define their own borders under international law, special consideration is to be given to a state that experiences a sudden influx of third country nationals, and each Member State retains control over the number of third country nationals permitted to enter and take up employment. In the field of police cooperation among the Member States a role is created for Europol, but any coercive measures are strictly reserved to national authorities. In broad terms the Constitution requires that legislation in the area of freedom, security and justice must also respect the different legal systems and traditions of the Member States.

3.2 **The Union's Internal Activities and External action** (Chapter 17)

a. Internal market; limits on EU competence

While the EU has a general mandate to manage the Union's internal market, the Constitution contemplates derogations by Member States in time of economic need, wars or other disturbances. States may derogate from the free movement of persons and services by favoring nationals in public service positions and by restricting services related to a state's exercise of official authority. Furthermore, restrictions may be imposed on foreign nationals on grounds of public policy, public security or public health. The free movement of goods within the Union may be restricted on similar grounds, and the Member States may operate their own monopolies of a commercial character. The free flow of capital may be restricted in case of an external threat or on other grounds of public policy. The EU's exclusive authority in competition law is limited to rules that are necessary for the functioning of the internal market, and Member States are permitted to grant aids to their business

sectors for social, cultural and development reasons. In general, Member State law relating to the internal market may vary from EU harmonisation requirements for reasons of public policy, morality, health, culture and even protection of a state's working environment.

b. Economic and monetary union; the non-participants

Despite the fact that the EU is to provide economic policy coordination and guidelines, the Constitution emphasises that the Member States will have their own economic policies. And although monetary union is a signature program of the Union, certain Member States have been permitted to opt out of the euro-zone and maintain substantial control over their own monetary policies.

c. "Other areas;" retention of national competence

In a chapter dealing with EU policies in "other areas," the Constitution addresses a wide range of subjects, many of which give particular consideration to the Member States. The Union's coordination of employment policies recognises that these policies are essentially national in character, and harmonisation of Member State employment laws is prohibited. EU social policy harmonisation is to take account of diverse forms of national practice. In the field of environmental protection, the EU and the Member States are recognised as having their own spheres of competence, and Member States as well as the Union are permitted to enter into international agreements. Trans-European networks relating to transport, tele-communications and energy supply are considered an area of shared competence, but any network that touches upon the territory of a Member State must be approved by the affected state. In the areas of research, technological development and space, the Union may complement Member State activity, but national competence is retained, and in some cases an EU program may involve certain states only.

d. Areas of supporting, coordinating or complementary action; a limited EU role

In the seven broad areas in which the EU is permitted to offer supporting, coordinating or complementary action, harmonisation of Member State laws is specifically prohibited with respect to industrial policy, cultural development, tourism support, education, sport, civil protection and administrative cooperation. The Constitution also recognises that each Member State is responsible for the content of its own education and

vocational training, as well as for the cultural and linguistic diversity in its education system. While the EU will offer administrative support to the Member States with regard to their implementation of Union law, any state may decline to accept this assistance.

e. External action; national sovereignty

The EU is charged with a variety of responsibilities in external action, including development of a common foreign and security policy and the framing of a common security and defence policy. Nevertheless, these are fields in which the Member States retain substantial autonomy, and significant protections for the states are built into EU competences.

All policy decisions on external action are subject to a unanimous vote of the European Council. In the CFSP the Constitution emphasises containment of EU competences, mutual solidarity among the Member States and use of national as well as EU resources, while the Union is encouraged to strengthen systematic cooperation among the states. EU laws are not permitted in the CFSP; rather, action is to take the form of decisions. A Member State that objects to a decision may, as an alternative to exercising its veto power, opt out of the matter and permit the other states to proceed. Enhanced cooperation in foreign policy is permitted for groups of Member States.

In matters of defence, the EU is charged with the progressive framing of a common policy, but all decisions are to be unanimously made by the Council or European Council. Furthermore, the separate policies of the Member States and the obligations of certain states in NATO are to be respected. Member States are required to assist each other in case of attack, and the Constitution recognises the needs for a state's own defence secrecy and trade in arms. Military resources are to stay in the hands of the Member States, and groups of states may be enlisted to carry out EU policy, while certain states may engage in permanent structured cooperation.

The common EU commercial policy includes Member State protections such as unanimous Council voting on certain matters, a declaration that such policy may not affect EU and Member State competences, and a prohibition of harmonisation of state laws if the Constitution provides such restrictions. In matters of development cooperation, EU policy must complement Member State policies, and the Constitution recognises the right of the states to conclude their own international agreements. Similar recognition of Member State competence is

expressed with regard to economic, financial and technical cooperation with third countries and with regard to humanitarian aid. The general authority of the EU to enter into international agreements is expressly qualified by a statement that the Member States' competence to enter into such agreements is not to be prejudiced by Union action. Furthermore, in its activities in third countries and with international organisations, the EU is required to cooperate with Member State diplomatic and consular missions.

4. SUMMARISING THE DIVIDING LINES

As broadly described in the foregoing preview, the European Union's dividing lines may be characterised in several ways. Many of them are obvious, and these would include specified limitations on EU competences and the right of a Member State to block a decision that requires unanimity. The procedures available to amend the Constitution represent the ultimate expression of intergovernmentalism, with each Member State separately permitted to determine whether to approve or reject a proposed amendment.

Other dividing lines prove to be more subtle. For example, where values and objectives are stated for the Union, this does not imply that national values and objectives are thus diminished. Objectives relating to centralised activities may well be shared by the Member States. Another such subtlety is found in the highly detailed descriptions of the EU institutions, their competences and their operating procedures. Beneath the surface of these descriptions one may find many instances in which the Member States exert their individual influences on the EU institutions or on the activities being carried out by those institutions.

Lastly, we must recognize that the dividing lines may be complex, and richly so. The principles underlying EU action – for example, primacy and subsidiarity – may be rather simply defined, but history has proven them to be full of nuance and the subject of vigorous academic and political debate. A great deal of the intensity of such discourse stems from the push and pull of national interests within the Union. Similarly, a review of the wide range of the subjects of EU activity reveals many points of debate as to how Union activity should or should not impact Member State competence in the same field.

In broad terms, the dividing lines serve as metaphor for the entire course of European integration. Individual sovereign nations have decided to band together for the greater good, but they do not wish to lose their nationhood in the process. No matter how successful and exciting the EU has

proven to be, one may never lose sight that it is not yet a United States of Europe. Many Europeans have viewed each stage of Union development with a critical eye and an earnest intention that the EU will never become integrated to that extent.

Chapter 6

Notable Changes that May Affect the EU's Dividing Lines

We conclude this introductory section by previewing and summarising the innovations in the Constitution that could have affected the existing dividing lines within the EU. Certain of the changes may have offered a shift toward the Union and toward central authority, at the same time diminishing the sovereignty or autonomy of the individual Member States. Other changes may have flowed in the opposite direction. It is worth emphasising that, unlike previous treaty amendments, it was not a primary purpose of the Constitution to expand EU competences or increase the pace of integration. Nor was it intended to "give back" any significant power to the Member States. Rather, the thrust of the constitutional project was to simplify, clarify and improve the existing EU institutions and procedures. That being said, some subtle shifting of the lines are the inevitable result of any treaty amendment.

1. SHIFTING AWAY FROM THE MEMBER STATES

Let us begin with a reminder that the new "legal order" previously described may well reflect meaningful movement toward a more cohesive and more supranational Union, and thus a corresponding diminishment of Member State sovereignty. The elements of this order are identified in part 1.1 below, along with other provisions in the Constitution that arguably would have shifted the EU's dividing lines toward more Union competence.

1.1 Structural and procedural matters

(1) The new document is called a "treaty establishing a constitution," suggesting that the EU is a more significant, constitutional entity. It repeals the EC Treaty and TEU, both of which are called treaties and nothing more.[228]

(2) The Constitution creates a new European Union that is the successor to the European Community and to the existing Union.[229] The new EU is a single, more cohesive entity than its predecessors.

(3) Along with the new Union is a single set of legal instruments for all Union law-making.[230] This effectively eliminates the Three Pillars and creates greater cohesion for the overall program of the EU.

(4) The grant of legal personality to the Union[231] and the acknowledgement of its legal capacity[232] may be seen as affirming and strengthening its existence apart from the Member States.

(5) The Constitution states that EU law has primacy over Member State law.[233] This principle had developed in the case law of the European Court of Justice, but the constitutional provision arguably strengthens the concept.

(6) The new delineation of the Union's competences as "exclusive," "shared" or "supporting, coordinating or supplementary"[234] arguably cements the authority of the EU, but it could also be posited that the clarification equally protects the competences of the Member States.

(7) The Constitution's flexibility clause is broader than its EC Treaty counterpart,[235] potentially opening the door to expanded EU activity. However, unanimous Council approval is required for any action taken under the flexibility clause, and the Constitution provides a new requirement of advance notification to the Member State parliaments.

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[228] Constitution art. IV-437(1).
[229] Constitution art. IV-438(1).
[230] Constitution art. I-33.
[231] Constitution art. I-7.
[232] Constitution art. III-426.
[233] Constitution art. I-6.
[234] Constitution arts. I-12 to I-17.
[235] Constitution art. I-18; EC Treaty art. 308.

(8) The most notable procedural changes are those instances in which unanimous voting on the Council or European Council is abandoned in favor of qualified majority voting. These provisions are described in detail in Chapter 15. As the analysis indicates, although these provisions do remove the veto power of each Member State, most of the changes are in areas that are not matters of vital national concern. In instances where sensitivities were strong, proposals for change (such as a suggested QMV for company tax harmonisation) were rebuffed at the Convention or the ensuing sessions of the IGC.[236] Proposals to permit amendment of the Constitution by a super-majority were also rejected,[237] with the result that the ordinary amendment procedure requires Member State ratification, and even the simplified amendment procedures in Part IV of the Constitution or its *passerelle* provisions permitting a streamlined approach to more qualified majority voting require some form of consent by each of the Member States or their representatives.[238]

1.2 Institutional changes

(1) The permanent President for the European Council[239] has the potential to give greater attention to the EU, both within Europe and without. A more prominent face to the Union could draw attention away from Member State officials.

(2) The new Union Minister for Foreign Affairs[240] could create greater EU visibility in a manner similar to that of the new European Council President. In addition, the Minister would chair the Foreign Affairs formation of the Council of Ministers,[241] in place of the current system in which the presidency rotates among the Member States. This removes a measure of political prominence, if not actual power, from the national governments.

(3) The reduction in composition of the Commission to less than one commissioner from each Member State[242] was anticipated in the Treaties, and the Constitution proposed to fix the body's eventual size and the date of its restructuring. The eventual end to permanent participation of each state in this

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[236] See text accompanying note 977, infra.
[237] See Norman, supra note 152, at 81, 293, 332.
[238] See discussion in part 2 of Chapter 11.
[239] Constitution art. I-22.
[240] Constitution art. I-28.
[241] Constitution art. I-24(7).
[242] Constitution art. I-26(6).

institution[243] will to some extent diminish the individual voices of the Member States in Brussels.

1.3 Substantive developments

(1) Charter of Fundamental Rights, despite the Constitution's disclaimers,[244] might have extended the Union's reach into individual rights, and it would have expanded the jurisdiction of the European Court of Justice.

(2) The Constitution authorises the Union to create EU intellectual property rights,[245] a field previously left to the Member States. In addition, EU action will for the first time be permitted in the areas of space, energy policy, tourism, sport, civil protection, administrative cooperation and certain aspects of public health.[246] To the extent the Union actually enters these fields, the previous autonomy of the Member States on such matters will be lost. Additionally, the EC Treaty's requirement of unanimous Council decisions in matters of culture is changed to qualified majority voting – a minor but potentially interesting loss of the national veto power.[247]

(3) The Constitution identifies as areas of "shared competence" the following: the internal market, social policy, policies relating to economic, social and territorial cohesion, agricultural and fisheries policy, the environment, consumer protection, transport, trans-European networks, energy, the area of freedom, security and justice, and common safety concerns in public health.[248] The concept of shared competence had not been articulated in the Treaties, and it is possible that in some instances the Union's newly articulated right to pre-empt action in these fields might diminish Member State activity.

(4) The Constitution extends the jurisdiction of the European Court of Justice into several aspects of the common foreign and security policy and into the area of freedom, security of justice.[249] These extensions have the potential of undercutting the authority of the Member State courts.

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[243] Constitution art. I-26.
[244] Constitution art. II-111(2).
[245] Constitution art. III-176.
[246] See discussion in part 1.3 and 1.4 of Chapter 17.
[247] See discussion in part 1.4 of Chapter 17.
[248] Constitution art. I-14(2). See discussion in Chapters 16 and 17.
[249] See discussion in part 5 of Chapter 13.

(5) In the area of freedom, security and justice, there are several additional constitutional developments that arguably diminish the authority of the Member States. First, there is a shift from unanimous Council voting in the Third Pillar to qualified majority voting in many instances. Second, the right of Member States to initiate legislation in the field has changed from the right of a single state to do so to the requirement that one-fourth of the states must participate.[250] Third, new EU action is permitted with respect to developing uniform standards for cross-border crime, support for crime prevention programs, and the establishment of an EU Public Prosecutor.[251]

(6) In the field of the common foreign and security policy, the Constitution creates new areas in which qualified majority decisions are permitted on the Council. It also allows the European Council to unanimously decide to extend qualified majority voting into new areas, without amending the Constitution.[252]

(7) With respect to the Union's common security and defence policy, the Constitution speaks for the first time of the EU developing its own operational capacity, and it provides for establishment of a European Defence Agency.[253] Although this strongly suggests expansion of EU activity at the expense of the Member States, it is important to note that decisions in these matters must be taken by consensus on the Council or European Council.[254]

(6) Where the TEU anticipates bilateral cooperation between Member States within the framework of the Western European Union and NATO,[255] the Constitution provides that such activities may take the form of structured cooperation "within the Union framework."[256] A greater role for the EU may entail an eventual loss of Member State autonomy in matters of defence.

2. NEW EMPHASIS ON THE MEMBER STATES

More remarkable perhaps than the new focus on the Union are the numerous examples of how the Constitution underscores the importance of

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[250] See discussion in Chapter 16. The increased difficulty of implementing the Member State initiative arguably strengthens the residual right of initiative held by the Commission.
[251] Constitution arts. III-271, III-272, III-274.
[252] See discussion in Chapter 17.
[253] See discussion in Chapter 17.
[254] Constitution arts. I-41(2), (4).
[255] TEU art. 17.
[256] Constitution art. I-41(6).

the Member States within the EU system. All of the items included in the following descriptions are novel, that is, they are not found in the Treaties at all or are given significant new emphasis in the Constitution.

2.1 Reminders and mandates regarding the Member States

In its statements about the Union's objectives, the Constitution makes more frequent reference to the role of the Member States in pursuing those objectives.[257] More substantively, the Constitution requires the EU to respect the equality of the Member States, their national identities and their essential state functions,[258] all in terms more forceful than those found in the Treaties. The Union is to treat the states with "full mutual respect" and deal with them in "sincere cooperation,"[259] phrases not found in the Treaties. It must respect the cultural and linguistic diversity within Europe,[260] and it must respect the status of churches and other such organisations under national law.[261] The Union must offer more open meetings of its institutions,[262] greater access to its documents[263] and more availability for consultation with citizens and civil society.[264] It must also respect the Member States' human rights traditions.[265] The EU is recognized as a legal entity, and in that capacity it may have responsibilities under Member State law.[266] EU citizenship is specifically supplemental to Member State citizenship and does not replace it.[267] One interesting linguistic innovation is the fact that the Constitution's preamble does not speak of "ever closer union" among the states, as the Treaties do.[268]

2.2 EU structural, institutional and procedural concepts

The Constitution goes well beyond the Treaties by carefully defining the exclusive, shared and other competences of the EU.[269] Arguably this new clarity may benefit the Member States as well as the EU, as it may curb Union encroachment into areas reserved to or shared with the states. The

[257] See discussion in Chapter 7.
[258] Constitution art. I-5(1).
[259] Constitution art. I-5(2).
[260] Constitution art. I-3.
[261] Constitution art. I-52.
[262] Constitution art. I-50(2).
[263] Constitution art. I-50(3).
[264] Constitution art. I-47.
[265] Constitution art. I-9(3).
[266] Constitution arts. I-7, III-426.
[267] Constitution art. I-10.
[268] EC Treaty Preamble; TEU Preamble.
[269] Constitution arts. I-11 to I-18.

Constitution also expands on a vaguely-worded concept in the EC Treaty, emphasising that the Union's powers are conferred by the Member States, and that all competences not conferred are reserved to the states.[270] If the Union acts under its flexibility clause, it is required to give advance notification to the Member State parliaments.[271] In areas of EU supporting, coordinating or complementary action, the Constitution clearly states that EU action may not supersede Member State competence in the same fields and may not require harmonisation of Member State law.[272] Of equal significance is the fact that the Constitution's protocols on national parliaments and subsidiarity provide new clarity and an expanded involvement on the part of the Member States.[273]

The Constitution clarifies that the European Council must normally act by consensus,[274] and it emphasises that the members of the European Council and Council of Ministers are to actively represent the interests of their respective Member States.[275]

The Council must act unanimously to set the newly created multiannual financial framework.[276] Likewise, laws passed under the Constitution's flexibility clause must receive unanimous Council approval.[277] The new citizen initiative process offers greater participation directly to European citizens, rather than to their national governments, but a significant number of Member States must be represented in the signature lists for an initiative proposal to be legitimate.[278] Groups of states with higher military capabilities may establish their own permanent structured cooperation within the EU framework.[279] The ultimate procedural development in favor of the Member States is the new withdrawal provision, which permits any state to declare its intention to exit the Union and then do so without being punished.[280]

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[270] Constitution arts. I-1, I-11.
[271] Constitution art. I-18.
[272] Constitution art. I-12(5).
[273] Protocol on the role of national Parliaments in the European Union, Dec. 16, 2004, O.J. (C 310) 204 [hereinafter Protocol on National Parliaments]; Protocol on the application of the principles of subsidiarity and proportionality, Dec. 16, 2004, O.J. (C 310) 207 [hereinafter Protocol on Subsidiarity].
[274] Constitution art. I-21(4).
[275] Constitution arts. I-23(2), I-46.
[276] Constitution art. I-55(2).
[277] Constitution art. I-18(1).
[278] Constitution art. I-47(4).
[279] Constitution art. I-41(6).
[280] Constitution art. I-60.

2.3 EU internal policies

Various matters of new EU activity provide emphasis on the Member States. The selection of language arrangements for new EU intellectual property rights requires a unanimous Council vote.[281] EU activities in space may not interfere with Member State competence in such endeavors.[282] In the new fields of tourism,[283] sport,[284] civil protection[285] and administrative cooperation,[286] EU activity may not entail harmonisation of Member State laws.

In the area of freedom, security and justice a new provision requires the European Council, acting unanimously, to set strategic guidelines for legislative and operational planning within the field.[287] In addition, the EU is called upon to respect the different legal systems and traditions of the Member States.[288] National parliaments are to ensure that certain activities in the AFSJ field must comply with the principle of subsidiarity.[289] In the matter of border checks, asylum and immigration, new emphasis is placed on the right of each Member State to determine geographical demarcation of its borders under international law[290] and to determine the volumes of third-country nationals to be granted work permits,[291] and the principles of solidarity and fair sharing of responsibility are highlighted.[292] In the area of police cooperation, any coercive measures are to be carried out by national authorities, rather than by Europol.[293]

2.4 EU external action

The European Council must act unanimously to set the strategic interests and objectives of the EU in all of its external action, not just in the area of common foreign and security policy, and use of Member State

[281] Constitution art. III-176.
[282] Constitution art. I-14(3).
[283] Constitution art. III-281.
[284] Constitution art. III-282.
[285] Constitution art. III-284.
[286] Constitution art. III-285.
[287] Constitution art. III-258.
[288] Constitution art. III-257.
[289] Constitution art. III-259.
[290] Constitution art. III-265.
[291] Constitution art. III-267.
[292] Constitution art. III-268.
[293] Constitution art. III-276(3).

resources is contemplated.[294] Special note is made of the fact that Union activity in the CFSP may not affect the competences specifically granted to the EU in the Constitution, and by implication CFSP activity may not affect Member State competences either.[295] In the common security and defence policy, Member States are called upon to assist each other,[296] the obligations of certain EU members under NATO are respected,[297] and structured cooperation among groups of states is contemplated.[298] In matters of humanitarian aid, EU action is to complement Member State action,[299] and the states must assist each other under a new solidarity clause.[300]

3. SUMMARISING THE CHANGES

There is a risk of over-simplification in offering a capsule summary of the changes that are already summarised in this chapter. Nevertheless a few broad comments are possible. First, the structural and procedural changes proposed in the Constitution might indeed suggest a new legal order for the European Union, but this would not be accompanied by an overt shift of competences to the EU institutions. Second, the major institutional changes might well serve to increase the Union's efficiency and visibility, but again there is no proposal for an obvious increase in institutional competences. Finally, selected areas of substantive change, such as inclusion or the Charter of Fundamental Rights and the increase of QMV decision-making in the AFSJ, do in fact increase the EU's competences while eliminating some opportunities for individual Member States to block EU action. Item for item, however, it is difficult to see these developments as anything other than incremental. In short, although certain dividing lines would shift under the Constitution, the potential movement is not nearly as dramatic as many critics have claimed.

[294] Constitution arts. I-40(4), I-41(3), III-293(1), III-310.
[295] Constitution art. III-308.
[296] Constitution arts. I-41(7), I-43.
[297] Constitution art. I-41(2).
[298] Constitution arts. I-41(6), III-312.
[299] Constitution art. III-321(1).
[300] Constitution art. III-329.

Part Two: The Character of the EU

We now move into the detailed analysis of the Constitution and how it compares with the existing Treaties. This part will examine the essential character of the European Union as endowed by the Constitution, because the very nature of the EU and its institutions reflects the dividing lines between the Union and its Member States.

The outline of this part was previewed in Chapter 5, and the analysis begins with Chapter 7 addressing the values on which the EU is founded and the objectives it must pursue. Chapter 8 then explores the various ways in which the Union resembles a nation state – it offers a type of citizenship, it manages its own budget and it is manifested in a set of institutions. As an organisation with citizens, the EU is perceived as having responsibilities to deal openly and transparently with them, and Chapter 9 analyses the extent to which the Union offers democratic rights. Certain of the complexities in managing the EU are dealt with in Chapters 10, 11 and 12. Because of the tension between the need for effective central action and the insistence that the Member States retain their own national sovereignty, a built-in fluidity has evolved to permit the Union to move forward even where full consensus may be lacking. Chapter 10 analyses that flexibility. In contrast, Chapter 11 deals with the historical fact that the EU has its roots as a treaty organisation, and thus the Constitution retains the requirement that it cannot be amended without the complete agreement of all Member States. Finally, Chapter 12 discusses a series of legal principles that guide and limit EU action.

These six chapters are intended to provide a meaningful portrait of the European Union, as well as an explanation of how its character is reflected in part by an identifiable set of dividing lines. With this portrait in mind, Part Three will address more fully the EU's institutions and the processes by which they make and carry out its laws.

Chapter 7

Values and Objectives

The underpinnings of any organisation are the guiding principles on which it is based and the goals it will pursue. Both the EC Treaty and the Treaty on European Union contain broad statements of values and objectives,[301] and the drafters of the Constitution seized the opportunity to include such expressions in the new document. However, as an integral part of the expressed intentions for the Union, the authors of the Treaties and Constitution have also chosen to include affirmations of the Member States and their separate traditions.

1. VALUES UNDERLYING THE EU

1.1 **Shared values**

The Constitution's Preamble emphasises the "cultural, religious and humanist inheritance of Europe" and the "universal values of the inviolable and inalienable rights of the human person, democracy, equality, freedom and the rule of law." The preamble to Part II of the Constitution, the Charter of Fundamental Rights of the Union, reiterates these ideas. References to the EU's values may also be found within the body of the Constitution. According to Article I-1(2), the Union is to be open "to all European States which respect its values and are committed to promoting them together." Article I-2 is entitled "The Union's Values," and it states them to be "respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." Article I-2 adds: "These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail." The values expressed in Article I-

[301] See EC Treaty Preamble; EC Treaty arts. 2–6; TEU Preamble; TEU arts. 1–3, 6.

2 are amplified in Part III, Article III-292(1), relating to the EU's external action.

The Union and its institutions are called upon in Articles I-3 and I-19 to promote its values,[302] and, Article I-57(1) states that these values are to be the foundation for the EU's relationships with its neighbouring states. Under Article I-41(5), Member States may be requested to take action to "protect the Union's values and serve its interests." To demonstrate the seriousness of the Union's commitment to its stated values, Article I-59 permits the EU to suspend the constitutional rights of a Member State if it commits a "serious and persistent breach" of the values articulated in Article I-2.[303]

In contrast to the Constitution, the EC Treaty tends to speak of goals and objectives rather than underlying values. However, values are implicit in the EC Treaty Preamble's reference to "solidarity," "prosperity" and "peace and liberty," and also in Article 2, which refers to "social protection," "equality between men and women," and "economic and social cohesion and solidarity among Member States." However, the primary thrust of the first 6 articles of the treaty is values relating to the economic sphere. For example, EC Treaty Article 2 mentions "a harmonious, balanced and sustainable development of economic activities," while Article 4(1) emphasises "the principle of an open market economy with free competition." Article 6 ties in the concept of environmental protection.

The Constitution's statements of values have their true antecedents in the Treaty on European Union, which expresses values in a broader and deeper fashion than does the EC Treaty. The TEU's Preamble confirms the principles of "liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law." It also affirms the importance of "fundamental social rights" and "solidarity" between the "peoples" of the Member States. TEU Article 6(1) contains the broadest and most significant statement: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law."

According to Article 49 of the TEU, any European state that respects the principles of Article 6(1) may apply for Union membership, and indeed, the accession process should include careful scrutiny of a candidate country's human rights record. Once membership is achieved, a Member State must adhere to these values, and TEU Article 7 provides that any Member State which is in "serious and persistent breach" of these values may have its treaty rights suspended, including its voting rights on the Council.

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[302] Constitution arts. I-3(1), I-3(4), I-19(1).

[303] A further discussion of suspension of rights is found in part 3 of Chapter 10.

Certain of the values and concepts mentioned in the Constitution are unprecedented. These include its Preamble's reference to the "cultural, religious and humanist inheritance of Europe" and the Article I-2 statement regarding "the rights of persons belonging to minorities." Overall, the Constitution does expand somewhat the tone and content of the description of EU values. In general, the additional emphasis in the Constitution may be seen as stylistic. However, in an age in which substantial immigrant populations have developed throughout the Union, the reference to the rights of minorities is particularly appropriate.

Among the more interesting European values are two references that were not included in the Constitution. The document contains no reference to God and no mention of the Christian heritage of Europe. These were proposed and vigorously debated at the Convention,[304] but to no avail. The final version of the Constitution's Preamble contains a bland but more inclusive opening line acknowledging that the Member States are "drawing inspiration from the cultural, religious and humanist heritage of Europe." These references may constitute an acknowledgment that Christianity is no longer the force that it has been in the past, or they may be tailored to make the millions of Muslim immigrants or a nation such as Turkey feel more at home in the Union. In any event, the agreed statements reflect a secular approach at the EU level, akin to the official stance and status of the French government.[305]

1.2 **National traditions**

In preface to a statement about closer union and common destiny, the Constitution's Preamble speaks of the "peoples" of Europe (not "people") who remain "proud of their own national identities and history." The paradoxical phrase "united in diversity" is used in the Preamble and is designated in Article I-8 as the Union's official motto. The Preamble also

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[304] Jean-Claude Piris, The Constitution for Europe – A Legal Analysis, 131 (2006).

[305] The editorial committee of the Common Market Law Review has commented on the sought-after reference to the Christian heritage of Europe: "At a strictly legal level, the debate is of little interest and the question of the origins of Europe is a matter for historians. At a political level, it is extremely sensitive. A reference to religious origins can entail reservations from States which are strictly secular as well as the opposition of those who consider that the traditions inherited from the enlightenment are at least equally valuable. A reference to the Christian origin rightly causes indignation among non-Christian religions, whose contribution to the development of Europe has been important." Editorial Comments, A Constitution for Europe, 41 C.M.L.R. 899, 903 (2004).

gives credit to the European Convention for having written the Constitution on behalf of the "States of Europe" as well as for the citizens of Europe. The preamble to Part II declares that the Union respects "the diversity of cultures and traditions of the peoples of Europe as well as the national identities of the Member States." Article I-2 of the Constitution refers to values are "common to the Member States." The preamble to Part II also proclaims regard for "the constitutional traditions and international obligations common to the Member States." In Article I-52(1) the Constitution affirms the EU's respect for the status of churches and other religious associations under the national laws of the Member States.[306]

The Preamble to the EC Treaty refers to the "peoples" of Europe three times, and states the goal of economic and social progress "of their countries." Article 2 looks for "solidarity among Member States" and "the flowering of the cultures of the Member States." The TEU Preamble also mentions the "peoples" of Europe in three separate statements: first, the Member States have a goal of "economic and social progress for their peoples;" second, the states share a desire "to deepen the solidarity between their peoples while respecting their history, their culture and their traditions;" and third, the states have a mutual goal of "an ever closer union among the peoples of Europe." TEU Article 1 mentions again the ever closer union of the "peoples," as well as consistency and solidarity in relations "between the Member States and their peoples." The Member States and their values are particularly emphasised in TEU Article 6(1), which recites the Union's core values and notes that they are "common to the Member States." Article 6(2) also speaks of human rights "as they result from the constitutional traditions common to the Member States."

While the Constitution and the Treaties have generally used similar terms to require respect for the peoples and traditions of the Member States, the Constitution's reference to the status of churches and other religious associations under Member State law is novel.

The treaty and constitutional provisions mentioned in this section are fitting illustrations as to just how the drafters of these instruments have sought to establish the Union while at the same time offering reminders of the importance of the Member States and their values and traditions. The Treaties are, and the Constitution was intended to be, first and foremost the constituent

[306] For a scathing criticism of Article I-52(1) and Article I-52(3) (which requires the Union to "maintain an open, transparent and regular dialogue with these churches and organisations"), see Nicola Giovannini, The Draft European Constitution and its antisecular article 51, 42 Am. Atheist Mag. 39 (Mar. 22, 2004).

documents of the Community and the Union, and yet there is an apparent need for well-placed reminders that the EU should not be spoken of as an entity on its own – its identity is still tied up with the separate identities and integrity of the Member States. Commenting on use of the word "peoples" rather than the singular form "people," Kalypso Nicolaidis argues that the word choice is appropriate to emphasise that a homogeneous European community is not necessary. "Our European demoi-cracy is predicated on the mutual recognition, confrontation and ever more demanding sharing of our respective and separate identities – not on their merger."[307]

2. UNION OBJECTIVES

2.1 **A wide-ranging set of internal and external objectives for the EU**

a. General statements in preambles

The Constitution's Preamble speaks of a "reunited" Europe, one that is "united ever more closely," and that "intends to continue along the path of civilisation, progress and prosperity." This Europe also "wishes to remain a continent open to culture, learning and social progress . . . to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world." In correspondingly broad terms the Preamble to Part II speaks of the peoples of Europe who are "creating an ever closer union among them," and it emphasises the objective of strengthening the protection of fundamental human rights. Such rights are the subject of a separate analysis below. Despite these shared goals, the motto for the EU will be "United in diversity."[308]

The Preamble to the Treaty on European Union speaks of "a new stage in the process of European integration" and a deepening of solidarity between the peoples of the Member States. There is a desire to "enhance further the democratic and efficient functioning of the [EU] institutions," to "achieve the strengthening and convergence of their economies" and to accomplish monetary union, economic and social progress, EU citizenship, a common foreign policy and a common defence. The objectives are summarised as a desire to "continue the process of creating an ever closer union among the peoples of Europe." TEU Article 1 repeats the goal of "an ever closer union among the peoples of Europe."

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[307] Nicolaidis, supra note 84, at 5.
[308] Constitution art. I-8.

The Preamble to the EC Treaty also speaks of an "ever closer union among the peoples of Europe," while affirming as the "essential objective" of the efforts of the Member States "the constant improvements of the living and working conditions of their peoples." Many of the broad statements in this Preamble focus on the goals of the internal market, but there is also recognition of the need for the states to "strengthen peace and liberty" and to "promote the development of the highest possible level of knowledge for their peoples through a wide access to education."

The Treaties both express a goal of achieving "ever closer union" among the Member States. In an interesting variation on this theme, the Constitution's Preamble refers to a "reunited" Europe, and it describes peoples who are already "united ever more closely" and will "forge a common destiny." The Preamble to Part II of the Constitution describes peoples who "in creating an ever closer union among them, are resolved to share a peaceful future based on common values." However, the Constitution does not state an affirmative ongoing Union objective of "ever closer union" as expressed in the Treaties. Instead, the drafters of the Constitution seem to have accepted the measure of closer union that has already been achieved, and they have offered a new motto for the EU: "United in diversity." The subtle shift in language in the Constitution is not a forceful political statement, but it is a shift nonetheless. There are sufficient numbers of Europeans and European leaders who believe that the EU has pushed its integration far enough, and thus "ever closer union" should not be pursued any longer. Perhaps, therefore, the motto should be clarified to say "United as far as we have come, but holding on to the diversity that we have retained."

b. Specific objectives within the EU

Like its Preambles, the substantive text of Constitution contains references to the EU's objectives, but in greater detail. The principal section is Article I-3, appropriately entitled "The Union's Objectives." The first three subsections focus on internal EU matters, and the Union is called upon to promote, offer, work for or ensure all of the following:

--peace, the EU's values and the well-being of its peoples,
--an area of freedom, security and justice without internal frontiers,
--an internal market where competition is free and undistorted,
--the sustainable development of Europe based on:

--balanced economic growth and price stability,
--a highly competitive social market economy, aiming at full employment and social progress, and

--a high level of protection and improvement of the quality of the environment,

--scientific and technological advance,
--an end to social exclusion and discrimination,
--social justice and protection,
--equality between women and men,
--solidarity between generations,
--protection of the rights of the child,
--economic, social and territorial cohesion, and solidarity among the Member States,
--respect for the EU's cultural and linguistic diversity, and
--the safeguarding and enhancement of Europe's cultural heritage.

Similar principles are stated in the initial provisions of Part III of the Constitution.[309] These articles largely overlap with Article I-3, but add the following goals for the internal affairs of the EU:

--a high level of education, training and protection of human health,[310]
--combating of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation,[311]
--consumer protection,[312] and
--animal welfare, but subject to Member State customs relating to religious rites, cultural traditions and regional heritage.[313]Article I-4 adds the following objectives for Union internal affairs:
--guaranteeing the "four freedoms" on which the internal market is based,[314] and
--prohibition of any discrimination on the grounds of nationality.[315]

Article I-3 of the Constitution has its antecedent in Article 2 of the TEU. The treaty provision lists a number of objectives for the EU, which the Union must promote, achieve, create, strengthen, establish, maintain and develop:

--economic and social progress,

[309] Constitution arts. III-115 to III-122.
[310] Constitution art. III-117.
[311] Constitution art. III-118.
[312] Constitution art. III-120.
[313] Constitution art. III-121.
[314] Constitution art. I-4(1).
[315] Constitution art. I-4(2). The four freedoms are described in part 1 of Chapter 17.

--a high level of employment,
--balanced and sustainable development,
--an area without internal frontiers,
--strengthening of economic and social cohesion,
--establishment of economic and monetary union, including a single currency,
--implementation of a common foreign and security policy,
--framing of a common defence policy,
--protection of the rights and interests of Member State nationals through offering EU citizenship, and
--an area of freedom, security and justice.

TEU Article 2 also stresses the need to maintain the full *acquis communautaire* of the Community. Article 2 is then supplemented by a number of provisions in the TEU and in the EC Treaty. TEU Article 6 calls upon the Union to respect:

--human rights and fundamental freedoms,
--the rule of law, and
--the national identities of the Member States.[316]

TEU Article 3 notes that the Union, in seeking to meet its objectives, must act "while respecting and building upon the *acquis communautaire*."

Article 2 of the EC Treaty calls on the EU to promote all of the following within the Community:

--a harmonious, balanced and sustainable development of economic activities,
--a high level of employment and of social protection,
--equality between men and women,
--sustainable and non-inflationary growth,
--a high degree of competitiveness and convergence of economic performance,
--a high level of protection and improvement of the quality of the environment,
--the raising of the standard of living and quality of life, and
--economic and social cohesion and solidarity among Member States.

EC Treaty Article 3 lists the activities of the Community, and this list includes further emphasis on principles such as strengthening of economic and social

[316] TEU art. 6(1), (2), (3).

cohesion and elimination of inequalities between men and women. It also offers a wide-ranging set of specific objectives:

--elimination of restrictions in trade among the Member States,
--a common commercial policy,
--free movement of goods, persons, services and capital,
--common policies or "measures" in agriculture, fisheries, transport, environment, industry competitiveness, consumer protection, energy, civil protection and tourism,
--regulation of competition,
--approximation of Member State laws to support the internal market,
--coordination of employment policies,
--a European Social Fund,
--economic and social cohesion,
--promotion of research, technological development and trans-European networks,
--a high level of health protection,
--contributing to education, training and culture,
--development cooperation, and
--cooperation with overseas countries and territories.

Article 6 of the EC Treaty emphasises environmental protection as a Community goal, as well as promotion of sustainable development. Many other sections of the EC Treaty state or imply objectives in relation to particular substantive programmes of the Community.

Because Union objectives are scattered throughout the substantive provisions of the Treaties and the Constitution, the above lists are not exhaustive. Rather, they focus on the objectives as stated in the introductory articles of the documents. Comparing the lists, it is evident that the Treaties' objectives have largely been mirrored in the Constitution, albeit with some rewording. However, several items in the Constitution are new. Where the Treaties emphasise equality between men and women, the Constitution calls for a general end to social exclusion and discrimination, solidarity between generations, protection of the rights of the child and combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. A general objective of animal welfare within the text of the Constitution is also an innovation, although protection of animals is mentioned in the EC Treaty,[317] and the terms of Constitution Article III-121

[317] EC Treaty art. 30.

on animal rights are essentially taken from a protocol to the EC Treaty.[318] Additionally, the Constitution's goal of respect for the Union's cultural and linguistic diversity is a new and sharper statement compared to the EC Treaty's goal of a flowering of cultures of the Member States.

The Constitution's expanded list of prohibited bases for discrimination is a modernisation of EU principles, which are already reflected in the Charter of Fundamental Rights adopted as a political commitment by each of the Member States, and the Constitution elevates these concepts to the level of constitutional principle.[319] But overall, the objectives set in the Constitution are already in place in the Treaties. What is clear from both the Treaties and the Constitution is that the focus of the European Union goes well beyond the internal market. A much broader concern for the lives of EU citizens is reflected in the Union's stated objectives.

c. Goals for the EU's external relations

Article I-3(4) of the Constitution focuses on external relationships of the EU, and in "its relations with the wider world" the Union is called upon to "uphold and promote its values and interests" and "contribute" to all of the following:

--peace,
--security,
--the sustainable development of the Earth,
--solidarity and mutual respect among peoples,
--free and fair trade,
--eradication of poverty,
--protection of human rights, in particular the rights of the child, and
--strict observance and development of international law, including respect for the United Nations Charter.

Article 2 of the Treaty on European Union includes as an EU objective that the Union should "assert its identity on the international scene," and TEU Article 3 calls for "consistency of its external activities as a whole," but neither provision specifically connects the Union's international activities to its stated goals and objectives. That connection may be found in TEU Article 11, which introduces the provisions on the Union's common foreign

[318] Protocol on protection and welfare of animals, Nov. 10, 1997, O.J. (C 340/110) [hereinafter Protocol on Animals].
[319] See the discussion in part 3 of this chapter.

and security policy (CFSP).[320] Article 11 states the objectives of the CFSP to be the safeguarding, strengthening, preservation, promotion or development of the following:

> --common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter,
> --the security of the Union in all ways,
> --peace,
> --international security,
> --international cooperation,
> --democracy and the rule of law, and
> --respect for human rights and fundamental freedoms.

Comparing the foregoing lists, it may be seen that the Constitution restates several of the general international objectives set forth in TEU Article 11, while adding sustainable development, solidarity and mutual respect among peoples, free and fair trade and eradication of poverty. This expanded list of external goals seems to be a sensible reflection of the scope of current EU interests and activities on the world scene. The Constitution may represent a better description of the EU's external objectives, but its formulation cannot be seen as a dramatic shift in EU policy as expressed in the Treaties.

d. Who is charged with achieving the objectives?

In broad terms, Article I-19(1) of the Constitution requires the EU institutions to "advance" the Union's objectives, and Article I-3(4) makes it clear that this is not only within the Union, but in the wider world. At the same time, Article I-5(2) calls upon the Member States to "facilitate the achievement of the Union's tasks and refrain from any measure which would jeopardise the attainment of the Union's objectives." Interestingly, where Constitution Article I-44(1) permits "enhanced cooperation" among groups of Member States – an activity that arguably undercuts the solidarity of the EU – even such programmes are mandated to "further the objectives of the Union."[321]

Article 3 of the TEU requires the institutions of the EU to "ensure the consistency and the continuity of the activities carried out in order to attain [the Union's] objectives." Article 3 then mentions consistency in the Union's

[320] See TEU arts. 11-28 (describing the CFSP).
[321] The significance of enhanced cooperation is discussed in part 4 of Chapter 10.

external activities, suggesting without explicitly stating that such activities must also meet Union objectives. Like Article I-5 of the Constitution, Article 10 of the EC Treaty requires the Member States to "facilitate the achievement of the Community's tasks" and to "abstain from any measure which could jeopardise the attainment of the objectives of this Treaty." Also like the Constitution, where TEU Article 43 permits programmes of enhanced cooperation, the programmes must be "aimed at furthering the objectives of the Union and of the Community." Overall, the Constitution offers a somewhat clearer mandate for the EU institutions to advance the Union objectives. However, the Constitution's changes are stylistic, and the substance of the Treaties relating to which parties must pursue Union objectives is largely carried over into the Constitution.

2.2 **EU objectives and the Member States**

Article I-1(1) of the Constitution declares that the Constitution establishes the European Union, but with the stated purpose of attaining the objectives that the Member States have "in common." Furthermore, the Union is required to "coordinate the policies by which the Member States aim to achieve these objectives." In the provisions of Constitution Article I-3(1) the EU is mandated to promote the well-being of its "peoples" rather than its "people." Its goals are further articulated in Article I-3(3) to include "economic, social and territorial cohesion, and solidarity among Member States," as well as respect for the Union's "rich cultural and linguistic diversity."

Articles I-1(1) and I-11(1) of the Constitution emphasise that the authority of the EU to pursue its objectives arises directly and solely from the competences conferred upon it by the Member States,[322] while Article I-3(5) limits EU action to "appropriate means, depending on the extent to which the relevant competences are conferred upon it in the Constitution." A role for the Member States themselves is described in Article I-5(2), which requires the states to "facilitate the achievement of the Union's tasks and refrain from any measure which would jeopardise the attainment of the Union's objectives."

The preambles of both Treaties mention the welfare of the "peoples" of Europe. TEU Article 6 emphasises respect for national identities as a Union objective, while EC Treaty Article 2 looks for solidarity among the Member States, and its Article 3 seeks the flowering of the cultures of the states. Article 10 of the EC Treaty, like Article I-5 of the Constitution, requires the Member States to "facilitate the achievement of the Community's tasks" and

[322] The principle of conferral is discussed in part 1 of Chapter 12.

to "abstain from any measure which could jeopardise the attainment of the objectives of this Treaty." At the same time, TEU Article 11(2) speaks of the Member States supporting the Union's CFSP and working together to "enhance and develop their mutual political solidarity" while refraining from any action that might impair the Union's effectiveness internationally.

While there is overlap between the treaty provisions and those of the Constitution, the Constitution more frequently mentions the Member States as participants in the pursuit of Union objectives. In particular, the Treaties contain no counterpart to the Constitution's statements in Article I-1(1) about the objectives shared by the Member States or their aim to achieve these objectives. A discussion in part 1 of Chapter 12 notes that EC treaty Article 5 does mention the principle of conferral, but the concept is not expressed in relation to the EU's objectives.

Despite the Constitution's emphasis on the Member State role in promoting Union goals, the Constitution's approach has been criticised. Andreas Føllesdal warns that the document pays "insufficient attention to the relationship between the objectives of the Union institutions and those of Member States, and their relative importance."[323] Føllesdal is correct in the sense that the Constitution's references to EU objectives and the Member States are somewhat random. There is neither a definitive, well-crafted exposition of EU objectives nor a careful delineation as to how exactly the Member States are to promote such objectives. However, when compared with the many specific programs and procedures addressed in a detailed and organised fashion in the Constitution, concerns over broad statements of objectives cannot be seen as having great importance.

In one of the more interesting turns of phrase in the Constitution, Article I-1(1) mandates the EU to exercise its conferred competences to achieve the Union objectives "on a Community basis." These words were inserted to replace an early draft's more ambitious phrase "on a federal basis."[324] No doubt due to the anti-federalist sensitivities of many European

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[323] Andreas Føllesdal, Achieving Stability? Forms and Areas of Institutional and National Balances in the Draft Constitutional Treaty, The Federal Trust Online Paper 06/04, at 5, available at http://www.fedtrust.co.uk/uploads/constitution/06_04.pdf [hereinafter Føllesdal TFT].

[324] The Preliminary Draft of the Constitution described "[a] Union of European States which, while retaining their national identities, closely coordinate their policies at the European level, and administer certain competences on a federal basis." Praesidium of The European Convention, Preliminary Draft Constitutional Treaty, Oct. 28, 2002, CONV 369/02, Part One, art. 1.

leaders, who fear that federation means a stronger supranational (and correspondingly weaker intergovernmental) system, there was vigorous opposition at the Convention to the term "federal."[325] As a result the "infamous F-word"[326] is never used in the Constitution to describe the Union's pursuit of its objectives. Kalypso Nicolaidis argues that the word "federal" might appropriately be used for the EU in its current form, but in the sense of a "federal union, not as a federal state." He concedes that the phrase "Community way" is "an acceptable second best."[327]

The Convention's semantic tussle over "federal" versus "Community" is reminiscent of the delicate and somewhat confusing use of words in the opening provisions of the Treaty on European Union. Article 1 of the TEU creates the new Union, which is "founded" on the existing European Communities, but "supplemented by the policies and forms of cooperation established by this Treaty." Thus, both a supranational "community" approach and an intergovernmental "union" approach are contemplated. Article 2 reiterates this duality by calling on the new Union to "maintain in full the [Communities'] *acquis communautaire*" (essentially perpetuating the supranational First Pillar regime) but also to "build on" the *acquis* (creating the new, more intergovernmental Second and Third Pillars).[328] However, Article 2 notes that this dual task of "maintenance" and "building on" is to be done "with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and institutions of the Community." This suggests that the intergovernmental Union may gradually yield to Community approach, and to some extent it has done exactly that, especially in the Third Pillar.[329] The tension between the

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[325] Kokott & Ruth, supra note 116, at 1321. Kokott and Ruth note that the term "constitution" was "especially for the British, as much a taboo as the term 'federal' itself. It seems, therefore, all the more remarkable that the Convention, backed by the political momentum of its convocation, quite quickly managed to raise the necessary support for picking up the Laeken reference to a 'constitutional text' and, in the end, by calling the text a 'Treaty establishing a Constitution' even went beyond what was terminologically expected until very recently." Id. at 1320. The Reform Treaty abandons the name "constitution."

[326] Markus G. Puder, Constitutionalizing the European Union – More Than a Sense of Direction From the Convention on the Future of Europe, 26 Fordham Int'l L.J. 1562, 1583 (2003).

[327] Nicolaidis, supra note 84, at 6.

[328] Note that TEU Article 3 also refers to "respecting and building upon the *acquis communautaire.*"

[329] Under the Treaty of Amsterdam caused matters such as visas, asylum and immigration policies, as well as civil law cooperation, to be transferred from the

intergovernmental and supranational schemes is evident in these provisions of the TEU, and the Convention's struggle over the word "federal" seems to reflect the ongoing debate.

3. PROTECTION OF THE RIGHTS OF INDIVIDUALS

3.1 **A multi-faceted EU approach to individual rights**

Part II of the Constitution[330] incorporates the Charter of Fundamental Rights of the Union (the Charter) into European Union law.[331] The Charter begins with a Preamble that acknowledges the Union's heritage and traditions, the diversity of its peoples and the identities of the Member States.[332] Against that backdrop the Preamble concludes with the following commitment: "The Union therefore recognises the rights, freedoms and principles set out hereafter." The ensuing text is divided into titles such as "Dignity, Freedoms, Equality, Solidarity, Citizens' Rights and Justice." In a final title relating to general application of the Charter, Article II-111(1) notes that the provisions of the Charter "are addressed to the Institutions, bodies and agencies of the Union . . . and to the Member States only when they are implementing Union law." Thus, EU activity at all levels is subject to the Charter's sweeping principles.

Apart from the Charter, the Preamble to the Constitution itself refers to "the inviolable and inalienable rights of the human person" and "due regard for the rights of each individual." Respect for human rights is identified in Article I-2 as a value on which the EU is founded. Article I-3 refers to human rights in general and "protection of the rights of the child."[333] Article I-9(1) refers to the Charter, but Article I-9(2) also requires the Union to accede to the European Convention for the Protection of Human Rights and

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Third Pillar to the First Pillar. See Jaap W. de Zwaan, The Legal Personality of the European Communities and the European Union, in Vol. XXX Netherlands Yearbook of International Law 75, 94-95 (1999) [hereinafter De Zwaan 1999].

[330] Constitution Part II, arts. II-61 to II-114.

[331] For a background perspective on the Charter, along with a review of the EU's experience to date with the Charter and with human rights in general, see Jacqueline Dutheil de la Rochère, The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty, 41 C.M.L.R. 345 (2004).

[332] For an analysis of the Preamble to the Constitution in comparison to the Charter Preamble, see Ingolf Pernice, Integrating the Charter of Fundamental Rights into the Constitution of the European Union: Practical and Theoretical Propositions, 10 Colum. J. Eur. L. 5 (2004).

[333] Constitution art. I-3(3), (4).

Fundamental Freedoms (ECHR).[334] A 1996 ruling of the Court of Justice had concluded that the European Community lacked the competence to do so.[335] Constitution Article I-9(3) also incorporates as "general principles of the Union's law" the fundamental rights resulting "from the constitutional traditions common to the Member States." Lastly, a series of articles in Part III of the Constitution, entitled "Non-Discrimination and Citizenship," provides for EU legislation relating to nationality-based discrimination and the rights guaranteed to EU citizens.[336]

The approach of the Treaties is less sweeping than that of the Constitution. The Preamble of the TEU affirms the EU's "respect for human rights and fundamental freedoms." TEU Article 6(1) notes that these are founding principles of the Union. Article 6 also states that the EU must respect the rights granted by the ECHR,[337] but, as noted above, the Community has not been able to become a signatory to the Convention. As an alternative course of action, under the Treaties the Union in 2000 adopted the Charter, not as a treaty provision but rather as a "solemn proclamation."[338] Article 11(1) of the TEU states that respect for human rights and fundamental freedoms is to be an objective of the Union's common foreign and security policy. EC Treaty Article 177(2) states that respect for such rights is an objective of the Community's activities in the field of development cooperation, and Article 181a(1) of the EC Treaty states a similar goal for Community action in the field of economic, financial and technical cooperation with third countries.

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[334] See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, 221 (entered into force Sept. 3, 1953). For commentary on the EU's accession to the ECHR, see Dutheil de la Rochère, supra note 331, at 352-53.

[335] The Court ruled: "As Community law now stands, the Community has no competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms because no provision of the Treaty confers on the Community institutions in a general way the power to enact rules concerning human rights or to conclude international agreements in this field . . . " Case 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Advisory Opinion, 1996 ECR I-1759.

[336] Constitution arts. III-123 to III-129. See the discussion on EU citizenship in part 2 of Chapter 8.

[337] "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . as general principles of Community law." TEU art. 6(2).

[338] Charter of Fundamental Rights, supra note 178, at 5.

Since the adoption of the Charter in 2000 as an EU proclamation and thus a political commitment by each of the Member States, there has been an uneasy co-existence between the ECHR, which is to be enforced by the European Court of Human Rights in Strasbourg (an independent, non-EU institution), and the Charter, which is to be respected by EU institutions under the watchful eye of the Court of Justice.[339] To add to the complications of this situation, the Charter requires the Court to follow the interpretations issued by the European Court of Human Rights in cases which the Charter's provisions correspond with provisions of the ECHR.[340]

Various commentators have criticised this state of affairs, noting that the EU should create more clarity and certainty by incorporating a declaration of human rights as part of its treaty framework.[341] As the Charter was being adopted, Youri Devuyst warned that it would be a "mere political declaration" if it were not incorporated into the Treaties.[342] Markus Puder has argued that either having the EU accede to the ECHR or incorporating the Charter into the EU Treaties would "enhance the protection of citizens' rights . . . and forcefully assert ethical and moral values within the integration system."[343] "Bolstering the fundamental rights at the European level has been described by Georgio Sacerdoti as a "crucial" factor in combating recent electoral successes of "racist and xenophobic" parties in countries such as Austria and Belgium.[344] The Laeken Declaration challenged the Convention to consider

[339] For an extensive analysis of the EU's relationship to the ECHR and the Charter, and the complex jurisdictional issues involving the European Court of Human Rights and the Court of Justice, see Sacerdoti, supra note 178.

[340] Charter of Fundamental Rights, supra note 178 art. 52(3). For an analysis of the Charter and the ECHR as "complementary instruments," see Pernice, supra note 332, at 12-16.

[341] For an analysis of the Charter "in the context of the much broader, less easily captured, and often slippery notion of European constitutionalism," see Gráinne de Búrca & Jo Beatrix Aschenbrenner, European Constitutionalism and the EU Charter of Fundamental Human Rights, 9 Colum. J. Eur. L. 355 (2003); see also Joseph H. H. Weiler, Human rights, constitutionalism and integration, in Eriksen, supra note 29, at 59; Neil Walker, The Charter of Fundamental Rights of the EU: Legal, Symbolic and Constitutional Implications, in Zervakis, supra note 29, at 119.

[342] Devuyst, supra note 68, at 49.

[343] Puder, supra note 326, at 1584. Puder notes that other alternatives would be to simply refer to the Charter in the EU Treaties or to adopt the Charter as sub-constitutional EU legislation. Id.

[344] Sacerdoti, supra note 178, at 51.

whether the Charter should be included in the Treaties or whether the EU should accede to the ECHR.[345]

The Convention boldly responded to Laeken and the critics, and the Charter was placed at the heart of EU law as a part of the Constitution.[346] Ingolf Pernice has commented:

> Inserting the Charter into [the Constitution] . . . is not only an important step in the process of constitutionalization of the European Union, but will affirm its very foundation. It will draw the citizens' attention to their fundamental role in this process, and to their responsibilities in an integrated Europe.[347]

The Treaties did recognise respect for human rights as a fundamental principle of the European Union, but the Constitution's inclusion of the Charter in its text – accompanied by the prospect that the Court of Justice might take a more active role in interpreting human rights within the Union – is one of the most significant changes proposed by the Convention and the IGC.

3.2 **Member State law and practice in human rights**

Despite the Constitution's wide-ranging mandate for the EU to respect human rights, the document does not ignore Member State law and practice. Article I-9(3) of the Constitution incorporates as "general principles of the Union's law" the fundamental rights resulting from "the constitutional traditions common to the Member States." In addition, in a matter analogous to human rights, Article III-121 of the Constitution requires that certain Union activities must "pay full regard to the requirements of animal welfare," but Union policy must also respect "the legislative or administrative provisions and customs of Member States relating in particular to religious rites, cultural traditions and regional heritage."

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[345] Laeken Declaration, supra note 143, at 24. For an analysis of the suitability of the Charter as a Bill of Rights in the Constitution, see Sionaidh Douglas-Scott, The Charter of Fundamental Rights as a Constitutional Document, 2004 Eur. Hum. Rts. L. Rev. 37, 42-48 (2004).

[346] For a thoughtful analysis of how the Charter, as Part II of the Constitution, will deal with the status of individuals under the law, see Guido Alpa, The Meaning of 'Natural Person' and the Impact of the Constitution for Europe on the Development of European Private Law, 10 Eur. L.J. 734, 747-749 (2004).

[347] Pernice, supra note 332, at 8.

Part II of the Constitution, the Charter itself, also contains numerous references to national laws of the Member States. For example, Article II-74(3) states that the right to education is to be respected "in accordance with the national laws governing the exercise of such freedom and right." Under Article II-76 the right to conduct business is recognised, but "in accordance with Union law and national laws and practices." The same joint reference to EU law and national norms is found in three provisions relating to certain rights of workers[348] and in Article II-94 regarding rights relating to social security and social assistance. Moreover, under Articles II-95 and II-96, health care rights and rights of "access to services of general economic interest" are tied to "the conditions established by national laws and practices."

In the general provisions at the end of the Charter, Article II-111 places emphasis on the limits of Union competence and the principle of subsidiarity. In forceful terms Article II-111(2) states that the Charter "does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers or tasks defined in the other Parts of the Constitution."[349] Article II-112, a provision on interpretation of the Charter, reiterates the need, in certain circumstances contemplated in the Charter, to recognise the constitutional traditions common to the Member States and to take "full account" of the national laws and practices of the States.[350] Article II-113 also prohibits any interpretation of its provisions in a manner that would adversely affect human rights recognised elsewhere by Union law, by international agreements to which the EU or States may be party, or by Member State constitutions.

In its incorporation of the Charter, the Constitution attempts to distinguish between "rights" and "principles." The first four subsections of Article II-112 reference various "rights," but subsection II-112(5) changes the focus to "principles" as follows:

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[348] Constitution arts. II-87, II-88, II-90.

[349] Two commentators have noted that "the General Provisions of the Charter [such as Article II-111(2)] are very clear in their intention not to confer additional competences on the EU . . . Whether respect for human rights becomes a more significant normative orientation of the EU legal order or whether these values remain (as some of those involved in drafting the Charter have expressly wished) more as a negative constraint on political action, remains to be seen." De Búrca & Aschenbrenner, supra note 341, at 380-81.

[350] Constitution arts. II-112(4), II-112(6).

> (5) The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

The differentiation between rights and principles has been described by David M. Trubek and Louise G. Trubek as an "awkwardly worded clause" which represents "an apparent effort to avoid judicial enforcement of social and economic rights."[351] They add that if the clause is so interpreted, "then direct judicial action in this sphere will be precluded."[352] However, they suggest that the Open Method of Co-ordination might be used as an alternative method of achieving what judicial enforcement might not accomplish.[353]

Lacking the Charter in their text, the Treaties have much less to say about human rights and thus fewer references to Member State practice. TEU Article 6(1) states that respect for human rights and fundamentals is a founding principle of the Union, but also a principle "common to the Member States." Article 6(2) mandates the EU to respect "as general principles of Community law" the fundamental rights as guaranteed by the ECHR, but also "as they result from the constitutional traditions common to the Member States." It has previously been noted in this chapter that the terms of Constitution Article III-121 on animal rights, including the mandate for the Union to respect the laws and traditions of the Member States, are a direct carryover from a protocol to the EC Treaty.[354]

The Charter, despite its sweeping statements, does offer substantive legal principles. And indeed, the Constitution's treatment of human rights is more comprehensive than that of the Treaties, but its approach may be too

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[351] David M. Trubek & Louise G. Trubek, Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination, 11 Eur. L.J. 343, 362-63 (2005).
[352] Id. at 363.
[353] Citing earlier work by De Búrca, Trubek and Trubek have suggested that the OMC could be used in "mixing 'hard' and 'soft' elements, and to strengthen economic and social rights." Id. For a general discussion of the OMC, see part III(F)(5) of this treatise. For further analysis of Article II-112(5), see Patrick Birkinshaw, A Constitution for the European Union? – A Letter from Home, 10 Eur. Pub. L. 57, 77-79 (2004).
[354] Protocol on Animals, supra note 318.

complicated.[355] For example, provisions in Parts I and II of the Constitution overlap with regard to certain substantive rights related to citizenship, personal data protection, access to documents and nondiscrimination.[356] But a larger concern is that when the Charter, the ECHR and especially the "constitutional traditions common to the Member States" all become part of EU constitutional law, then private parties, Union institutions and even the states themselves will face the daunting task of studying the laws of all of the EU nations to discern these common traditions.[357] In addition, Michael Dougan has argued that Constitution Article II-113, by deferring to these non-EU sources of law, undermines the principle of primacy of EU law.[358] There will likely be a need for a series of decisions by the Court of Justice to sort out the inconsistencies among these sources of law, and the Court may well be required to set rules of priority among them. Thus, in summary, the inclusion of the Charter in the Constitution was a significant development, and it may have represented an expansion of EU competences and thus a shift in the Union's dividing lines.

4. VALUES, OBJECTIVES AND THE DIVIDING LINES

It is perhaps a bit easy to dismiss statements of values and objectives as mere "window dressing" intended to make the Constitution more attractive to the masses while offering nothing of legal substance. This is perhaps more true for values than objectives. Nevertheless, lawyers and politicians could be

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[355] One commentator has stated: "A first reading of the Draft Constitution gives an impression of an accumulation of references to rights and values, not contradictory but, in my view, excessively cumulative, and therefore unable to promote a clear idea of the ambition of the Union for the individual." Dutheil de la Rochère, supra note 331, at 350. For analysis of the various components of the EU's human rights regime, see id., at 350-54. For further discussion of the complexities of the Charter in relation to other sources of human rights law, see Claudia Attucci, An institutional dialogue on common principles – Reflections on the significance of the EU Charter of Fundamental Rights, in Dobson, supra note 29, at 151-63.

[356] Constitution arts. I-10, II-99, II-100, II-104, II-105 (certain rights of EU citizens), I-51, II-68 (personal data protection), I-50, II-102 (access to documents), I-4, II-81 (non-discrimination). See also European Policy Center, The Draft Constitutional Treaty-An Assessment at 30, Issue No. 5 (July 3, 2003).

[357] For an analysis of the interplay between the various sources of human rights law, see Pernice, supra note 332, at 12-17.

[358] Michael Dougan, The Convention's Constitutional Treaty: A "Tidying-Up Exercise" that Needs Some Tidying-up of Its Own, The Federal Trust Online Paper No. 27/03, at 3, available at http://www.fedtrust.co.uk/uploads/constitution/27_03.pdf. Similar concerns have been expressed by Ingolf Pernice. See Pernice, supra note 332, at 30-32. Also see the discussion of primacy in part 3 of Chapter 12.

expected at some point to find useful material in such statements, whether for use in courtroom arguments or in the conference rooms of Brussels. Where substantive legal text is not precise, persuasive arguments can be made on the basis of value expressions. Court decisions or new programs can be justified by constitutional or treaty provisions that reveal the objectives and intentions of those who drafted and ratified the document.

Other than the significant inclusion of the Charter in the constitutional text, the Constitution in general merely restates the values and objectives already found in the Treaties. However, as noted the Constitution pays somewhat greater attention to the role of the Member States as participants in the pursuit of common objectives. A few turns of phrase in the Constitution – such as references to minorities and to the "cultural, religious and humanist inheritance of Europe" – are obviously novel and even controversial. Beyond the Charter, any impact that the Constitution's statements of objectives and values may have had on the EU's dividing lines would likely have been minor.

Chapter 8

The EU's State-Like Attributes

If the European Union is to be more than a mere aspiration, its stated values and objectives must be given substance. The entity must exist, it must have form and identity. In this chapter we will observe that the EU has been endowed with the characteristics of a governmental entity, including many attributes that resemble those of modern nation-states. In addition, the EU is comprised of official bodies that are similar to those found in a typical national government.[359] However, a closer look reveals a variety of carefully crafted limitations on the Union and its institutions.

1. THE EU'S LEGAL STATUS

A number of core characteristics define the Union's legal status. These include its existence and legal personality, its legal capacity, its privileges and immunities, its permanence as an entity, and even a number of nation-like symbols it possesses. Interestingly, as these are described in the Constitution, the constitutional text provides numerous reminders that the EU project does not diminish the residual sovereignty and integrity of the Member States.[360]

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[359] George Bermann has noted that the EU enjoys "a complex institutional apparatus enabling it to deliver a variety of state-like functions, among which we may discern functions broadly recognizable as law-making, law-applying, and law-enforcing. The very fact that the EU even has departments that we can liken, however approximately, to legislative, executive and judicial distinguishes it from most other such regimes. Not even NAFTA, the WTO, or the International Criminal Court – which are among the best-equipped international governance regimes – are nearly as well equipped." Bermann, supra note 47, at 365.

[360] Bermann qualifies the statement in the immediately preceding footnote by stressing that "the Member States are far from displaced, not only as norm-givers, but

1.1 **The legal character of the EU**

a. Existence; legal personality

The European Union is an entity created by, but existing apart from, the Member States. Article I-1(1) of the Constitution states: "Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union." Article I-7 declares simply: "The Union shall have legal personality." Notably, this statement is not found in the Treaties. Article 1 of the TEU states that "the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION," but neither it nor any other sections of the treaty mention a grant of legal personality. The European Community, on the other hand, is granted such character. Article 281 of the EC Treaty states clearly: "The Community shall have legal personality." The Constitution thus elevates the EU to the same legal status that had previously been granted to the Community.

The lack of legal personality for the EU has been regarded as "one of the more pronounced oddities of the existing European treaty structure."[361] Consider, for example, the question of whether the Union may enter into binding international agreements. Article 24(1) of the TEU empowers the Council to "conclude" international agreements in the Second Pillar, on the following terms:

> When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this title [Provisions on a Common Foreign and Security Policy], the Council may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency.

Article 24(6) further provides: "Agreements concluded under the conditions set out by this Article shall be binding on the institutions of the Union." Historically, the Council has in fact entered into agreements under TEU

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as the administrative apparatus upon which the effectiveness of EU policy still chiefly depends." Id.

[361] Norman, supra note 152, at 84. For an extensive analysis of the legal personality of the European Communities and of the Union, see De Zwaan 1999, supra note 329.

Article 24,[362] but the lack of full legal personality for the EU has raised questions as to just how far the EU as an entity could proceed to legally bind itself.[363] The Convention, working under a mandate to simplify the Treaties,[364] authored a constitutional provision that was intended to clear up these doubts.[365]

b. Legal capacity

The legal personality described above might be labeled as an "international law personality," in that it most significantly relates to the Union's ability to enter into agreements with third countries or international organisations. A second form of personality might be called "private law personality," a status that permits the EU to be a party to private legal matters. The Constitution and Treaties refer to this as "legal capacity."[366]

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[362] Two recent examples of Article 24 agreements include Agreement between the European Union and the Swiss Confederation on the participation of the Swiss Confederation in the European Union Monitoring Mission in Aceh (Indonesia), Dec. 31, 2005, O.J. (L 349) 30 (2005); and Agreement between the European Union and Canada establishing a framework for the participation of Canada in the European Union crisis management operations, Dec. 1, 2005 (L 315) 20 (2005).

[363] The European Community has authority under the EC Treaty to negotiate agreements in a variety of fields. See EC Treaty arts. 111, 133, 139, 170, 174, 181, 181a, 186, 300 and 310. Because of the clearly expressed legal personality of the Community, the binding nature of these agreements has not been questioned.

[364] Laeken Declaration, supra note 143, at 19, 23.

[365] Juliane Kokott and Alexandra Ruth have commented: "It might be briefly pointed out that the [Convention's] Working Group charged with the question rightly took as its starting point the assumption that the Union does indeed already at present possess an implicit international legal personality. While this was not the case under the regime of the Maastricht Treaty, and while the situation after the reform of Amsterdam initially remained unclear due to the (deliberately) imprecise wording of the newly introduced article on treaty-making power [TEU Article 24], the actual practice confirmed the existence of an implicit legal personality of the Union. By deciding not to perpetuate this duality with the attribution of an explicit legal personality to the Union alongside those of the Communities, but instead to merge both into a single personality and to accompany this step by a merger of the Treaties, the Convention adequately put into practice what the Laeken Declaration had implied. This must be warmly welcomed for reasons of effectiveness, legal certainty, transparency and as it heightens the profile of the Union vis-à-vis third States and European citizens." Kokott & Ruth, supra note 116, at 1323.

[366] Jaap W. de Zwaan provides a valuable description of the different forms of legal personality and how they manifest themselves in practice. See De Zwaan 1999, supra note 329, at 79-85.

Under Constitution Article III-426 the Union is also granted "the most extensive legal capacity accorded to legal persons" under the laws of the Member States, and in particular, the rights to own property and to be a party to legal proceedings. Furthermore, under Article III-431 the Union, as a legal person, is specifically made subject to the contract law of individual Member States and to tort law based on "the general principles common to the laws of the Member States." The operative language of the Constitution is identical to Articles 282 and 288 of the EC Treaty. Again, neither the EC Treaty nor the TEU mentions any legal capacity for the EU, and the Constitution extends the concept to the Union.

c. Privileges and immunities

Article III-434 of the Constitution provides that within the territory of the Member States the Union is allowed "such privileges and immunities as are necessary for the performance of its tasks." The constitutional provision mirrors the language of Article 291 of the EC Treaty, and both the Constitution and EC Treaty refer to a protocol that further delineates these privileges and immunities.[367] However, these characteristics relate to the Community only. Neither the TEU nor the EC Treaty mentions any privileges or immunities with respect to the Union. The Constitution addresses the EU to the same extent that the EC Treaty has addressed the Community, and the matter of privileges and immunities may be seen as both an outgrowth of the Union's legal personality and a further strengthening of the personality concept.

The concepts of legal personality for the Union, legal capacity and privileges and immunities in essence provide the Union with the status and capabilities that are afforded to any nation. In addition, with the merger of the Union and the European Community[368] the EU is able to operate as a single entity to carry out all necessary and appropriate activities within its constitutional mandate.

d. A permanent entity

Article IV-446 of the Constitution states: "This Treaty is concluded for an unlimited period." Article 312 of the EC Treaty and Article 51 of the TEU use precisely the same words. One might ask whether implementation of the Constitution would prove the treaty provisions to be wrong, that is,

[367] Protocol on the privileges and immunities of the European Communities, Dec. 16, 2004, O.J. (C 310) 261 [hereinafter Protocol on Privileges].
[368] Constitution art. IV-438(1).

whether the replacement of the Treaties would terminate the entities created by them. In fact, Article IV-438 is carefully crafted to preserve the concept of permanence by declaring the continued existence of the EU. Article IV-438(1) states that the EU under the Constitution will be the "successor" to the TEU's European Union and the EC Treaty's European Community. Under Article IV-438(3) the acts of the EU and Community will remain in force until specifically "repealed, annulled or amended," and the "other components of the *acquis* of the Community and of the Union" will similarly be "preserved until they have been deleted or amended." Likewise, Article IV-438(4) mandates that the jurisprudence of the Court of Justice and Court of First Instance will continue as the "source of interpretation of Union law and in particular of the comparable provisions of the Constitution." The same holds true for existing administrative and legal procedures, according to Article IV-438(5). Thus, by its own terms the Constitution does not end the existence of the "permanent" treaty organisations, but instead preserves them in a new form and under a new constituent document.

The effectiveness of the Constitution for an "unlimited period" and the continued existence of the Union are a continuation of these concepts as provided under the Treaties, and the principles provide essential stability. Both now and in the future the EU is not to be reinvented, replaced or reconfigured easily. As discussed in Chapter 11, this permanence is arguably reinforced by the unanimity requirement for amending the Constitution. However, permanence and stability do not necessarily mean that the EU will remain forever frozen in its current form. To the contrary, the Union is designed as a flexible entity with the capacity to expand and contract,[369] and despite the unanimity requirement the Constitution could be amended.

e. Nation-like symbols

The Constitution's Article I-8 provides the EU with the typical symbols of nationhood such as a flag, an anthem, a motto and an annual holiday, as well as a Union currency, the euro.[370] Except for references to the euro, which is a significant achievement of the Union and a cornerstone of EU market integration, the Treaties are silent as to these symbols. Article 4 of the EC Treaty refers to introduction of the single currency (called the "ecu"), and Chapters II, III and IV of Title VII of the EC Treaty[371] describe the

[369] For an analysis of the Union's flexibility, see Chapter 10.
[370] Constitution art. I-8. The Constitution contains numerous other references to the euro. See Constitution arts. I-13, I-15, I-30, III-177, III-186, III-191, III-194 to III-198, III-326, III-410.
[371] EC Treaty arts. 105-124.

programme for achieving the second and third stages of economic and monetary union, including numerous references to the common currency.[372] The TEU mentions the single currency in its Preamble and in the objectives stated in its Article 2. Although several of the EU symbols have been used under the Treaties, their formal adoption in Article I-8 of the Constitution represents a conscious effort by the Convention to institutionalise the outward manifestations that are associated primarily with nation states. The EU would have the "look and feel" of a state, and its use of the symbols was to be embedded in its Constitution.[373]

1.2 **The integrity of the Member States within the EU system**

a. Equality of the Member States

Article I-5(1) of the Constitution unequivocally requires that the EU "shall respect the equality of Member States before the Constitution." Without addressing the stature of the states vis-à-vis the EU itself, this provision recognises the separate identity of each Member State. The smallest states are entitled to all of the respect that flows toward the largest states. Article I-5(1) came about after a request by Portuguese representatives at the Convention to have the Constitution recognize the principle of the "sovereign equality" of the States.[374] A commentary has noted:

> This request raised drafting difficulties, because, presented in those terms, it could clash with the desire to reduce the number of Commissioners and could have made the question of voting rights more difficult to resolve. It was for those reasons that it was decided to state in Article I-5 the fact that the Union respected the equality of the Member States before the Constitution. This wording is merely the expression of the fact that the law and the Constitution apply in the same way to all. It does not prohibit discrimination provided it is objectively justified and respects the principle of proportionality. There is no doubt that the Court will be required to fine-tune this interpretation.[375]

Neither the EC Treaty nor the TEU mentions equality of the states in terms as broad as those of the Constitution. However, the Protocol on the

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[372] See EC Treaty arts. 118, 119, 121, 122, 123.

[373] The Reform Treaty would not include references to the flag, anthem, motto or annual holiday. See Presidency Conclusions, supra note 19, Annex I, art. 3.

[374] Editorial Comments, supra note 305, at 903.

[375] Id.

Enlargement of the European Union, attached to the Treaties through the Treaty of Nice, guarantees that Member States will be treated equally with regard to representation on the Commission when the Commission is comprised of less than one member per Member State.[376] Furthermore, ratification of a treaty or the Constitution and amendment of any of them require the consent of each Member State on an equal basis. Michael Dougan has written that the ratification requirement "reflects one of the organising principles of the Union order – of ultimate equality between the Member States in their capacity as Treaty authors."[377]

One of the more sensitive political issues arising from the Convention was the formula for qualified majority voting on the Council. As discussed in Chapter 13,[378] adjustments were necessary to the Convention's proposed formula in order to achieve IGC approval of the Constitution. The inescapable fact is that there are substantial variations in the populations of the EU's Member States, ranging from more than 80 million in Germany to less than half a million in Luxembourg and Malta. In an expanding Union it will be much more difficult to manage EU affairs on the basis of informal consensus among the Member States, and therefore the smaller nations may justifiably be concerned about their ability to avoid being completely dominated by the larger states. The equality clause in Constitution Article I-5(1) confirms the worth of the smaller states, although even they must recognise that in political terms their voices will not be as loud as those of the larger states.

b. Respect for national identities

Constitution Article I-5(1) also requires that the EU must respect the Member States' "national identities, inherent in their fundamental structures, political and constitutional . . . [and] shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security." Article 6(3) of the TEU offers a simpler mandate for the Union to "respect the national identities of the Member States," but neither of the Treaties mentions the essential state functions of the Member States or their fundamental structures. The enhancement offered in Article I-5(1) underscores the continuing importance and vitality of the Member States as sovereign nations whose national identities are manifested in the functions and structures of nationhood. As nations, they do not lose their essential character by participating in the

[376] Protocol on the enlargement of the European Union, Dec. 24, 2002, O.J. (C 325) 163 arts. 4(2), 4(3) (2002) [hereinafter Protocol on Enlargement].
[377] Dougan, supra note 358, at 13.
[378] See part 3 of Chapter 13.

European Union. This concept complements the notion of equality of the Member States, but again it is appropriate to acknowledge that political identity is quite a different matter from political power, whether in the EU or in the world community.

c. Cooperation and full mutual respect

Under Article I-5(2) of the Constitution, the Union on the one hand and the Member States on the other are required to adhere to "the principle of sincere cooperation." Pursuant to this principle, both the Union and the states must "in full mutual respect, assist each other in carrying out tasks which flow from the Constitution." The phrases "sincere cooperation" and "full mutual respect" are not found in the Treaties, but the Constitution's words have certain antecedents. EC Treaty Article 10 requires the Member States to "take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community." Article 10 also requires Member States to "facilitate the achievement of the Community's tasks" and to "abstain from any measure which would jeopardise the attainment of the objectives of this Treaty." Cooperation is often mentioned, but only with relation to specific policies. In the TEU, on the other hand, there is a general mandate for cooperation in Article 1, which refers to "the policies and forms of cooperation established by this Treaty." The same provision calls upon the Union to "organise, in a manner demonstrating consistency and solidarity, relations between the Member States and their peoples."

Despite some similarities with respect to cooperation, there are differences in emphasis between the Treaties and the Constitution. EC Treaty Article 10 requires the Member States to "facilitate the achievement of Community tasks," but the obligation as expressed in the treaty's text does not flow in the other direction.[379] In TEU Article 1 the Union is mandated to "organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples." In neither treaty are the EU and Member States called upon to treat each other with "full mutual respect." Thus, the Constitution arguably increases the stature of each Member State in its dealings with the European Union. The words of Article I-5(2) appear intended to prohibit a hegemonic relationship with the EU acting in supreme power over the Member States. Rather, the expressions prescribe a partnership in which the central authority will carry out a

[379] Note, however, that the European Court of Justice has declared the obligation of support to be mutual. See ECJ, judgment of 6 Dec. 1990, Case C-2/88, J.J. Zwartveld and others, [1990], ECR I-3365, para. 17.

necessary coordinating function without asserting complete dominance. The concept of full mutual respect is entirely consistent with the principles of equality of the Member States and respect for their separate national identities.

2. CITIZENSHIP

2.1 **Citizenship of the Union**

Under Constitution Article I-10(1) each national of a Member State is designated a "citizen of the Union." Article I-10(2) identifies the rights attendant to this grant. Most importantly, EU citizens are guaranteed the right to "move and reside freely" in any Member State, a benefit that Jaap W. de Zwaan has described as the "core business" of EU citizenship.[380] Furthermore, the Constitution ensures each citizen the right as a resident to vote and stand as a candidate in municipal and European Parliament elections, certain rights to diplomatic and consular assistance from any Member State, the right to petition the European Parliament, the right to seek assistance from the European Ombudsman, and the right to deal with EU institutions in any official EU language. Additional legislation relating these rights is contemplated in Part III of the Constitution,[381] and rights relating to voting and standing for election are reiterated in Articles II-99 and II-100. In broad terms Article I-19(1) mandates the Union to serve the interests of its citizens, and Article I-3(2) offers them "an area of freedom, security and justice without internal frontiers," along with an effective single market.

The Constitution does not significantly alter the citizenship provisions already existing in the Treaties. The EC Treaty contains most of the Constitution's principles relating to EU citizenship. Article 17 creates EU citizenship for Member State nationals. Article 18 permits EU citizens to "move and reside freely" anywhere in the EU. Article 19 grants EU citizens the right to vote and stand as a candidate in municipal elections where a person resides. Article 20 offers EU citizens the right to limited diplomatic and consular protection from other Member State governments. Article 21 ensures EU citizens the right to petition the European Parliament, the right to apply to the European Ombudsman, and the right to deal with Union institutions in any of the official EU languages, and Article 22 contemplates additional legislation on several of these matters. Article 154 offers EU

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[380] Jaap W. de Zwaan, European Citizenship: Origin, Contents and Perspectives, in The EU Constitution: The Best Way Forward? 245, 247 (Deirdre Curtin, Alfred E. Kellermann & Steven Blockmans eds., 2005) [hereinafter De Zwaan 2005].
[381] Constitution arts. III-125 to III-129.

citizens the "full benefit from the setting-up of an area without internal frontiers." EU citizens receive further mention in Articles 62, 191, 194, 195 and 255. The Preamble to the TEU and its Article 2 mention establishment Union citizenship. The Preamble mentions the resolve "to establish a citizenship common to nationals of their countries," while Article 2 speaks of "the introduction of a citizenship of the Union."

Union citizenship under the Treaties has been interpreted in a number of decisions by the European Court of Justice, described by Jaap W. de Zwaan as follows:

> In fact it took the Court some time to give European Citizenship, notably the free movement dimension thereof, a proper dimension. This, however not so much with respect to *economically active* EU citizens. Indeed their situation is already governed in clear terms by the rules of the internal market, notably the provisions of the EC Treaty and secondary law concerning the free movement of workers and the right of establishment for independents.
>
> No, the developments initiated by the Court of Justice concern the scope of – what is called – *non-economic* EU citizens who claim a right of residence in another Member State . . . such as
>
> --persons whose status under Community law is not clear;
> --job seekers;
> --students; or
> --family members.[382]

There is no indication in the Constitution that the Court's rulings were to be overturned, or that the scope of citizenship under the EC Treaty would be reduced. To the contrary, De Zwaan contends that under the Constitution EU citizenship would be "strengthened and promoted as a principle of EU law of major importance."[383] He bases this opinion not so much on the textual content of the Constitution's citizenship provisions – which in substance mirror the EC Treaty – but on the expansion of citizen rights in other parts of the constitutional text. He sees this expansion in the Charter of Fundamental

[382] De Zwaan 2005, supra note 380, at 247-48. For De Zwaan's full description of the various Court decisions, see id., at 247-52.
[383] Id. at 257.

rights[384] and in the "Citizen's Europe" provisions in Part I under the heading "The Democratic Life of the Union."[385]

By definition the members of a traditional intergovernmental organisation are nations, as represented by their governments. The IGO grants certain rights, privileges and services to its member states, and these benefits – such as free movement of goods and persons – may well flow through the states to their respective citizens. However, the organisation does not create a citizen class that is entitled to involvement at the IGO level. Citizens of the IGO's members do not generally expect to enjoy a direct relationship with the organisation separate and apart from their relationship with their own national government. In stark contrast, the EU Treaties have created a Union citizenship, and its citizens possess a number of significant rights directly related to the Union and its institutions.[386] In this respect the EU is clearly distinct from a classic IGO. The Constitution reaffirmed the EU's citizenship provisions and enhanced them with greater emphasis on citizen rights.

2.2 **National citizenship retains its vitality**

Unlike a federal nation, the EU does not offer a full, stand-alone version of citizenship. Article I-10(1) of the Constitution states: "Citizenship of the Union shall be additional to national citizenship; it shall not replace it." Rights to vote and stand as a candidate are limited by Article I-10(2) to municipal and European Parliament elections.[387] National and provincial elections are not mentioned, and "municipal" is not defined. The voting rules for such elections, according to Article II-100 are the "same conditions" that are applicable to nationals of the state. In other words, the national government will be fully competent to set its own election rules. In light of the slight amount of detail offered with respect to voting in another Member State, Article III-126 of the Constitution calls for EU legislation to supplement its provisions, but it notes that this legislation may provide for "derogations where warranted by problems specific to a Member State." The Constitution also contemplates EU legislation expanding the citizen rights

[384] Constitution arts. II-61 to II-114.
[385] De Zwaan 2005, supra note 380, at 257. See Constitution arts. I-45 to I-52.
[386] In addition to the rights described in Article I-10 of the Constitution, EU citizens enjoy, for example, the benefits of the "four freedoms," which include free movement of goods, persons, services (with the related right of establishment) and capital. See analysis in part 1 of Chapter 17. For a discussion of the connection between EU citizenship and the four freedoms, see Eleanor Spaventa, From Gebhard to Carpenter: Towards a (non-)economic European Constitution, 41 C.M.L.R. 743, 768-71 (2004).
[387] See also Constitution art. III-126.

described above, but according to Article III-129 such laws would require a unanimous vote on the Council and separate ratification by each of the Member States.

The citizenship provisions in the Constitution have essentially been carried over from the Treaties, both as to their emphasis on the Union and as to their emphasis on the Member States. Article 17(1) of the EC Treaty presages Article I-10 of the Constitution by noting that Union citizenship "shall complement and not replace national citizenship." Article 19 limits the right to vote and stand for election in other Member States to their municipal elections and elections for the European Parliament. As in the Constitution, national and provincial elections are not mentioned, and "municipal" is not defined. Article 19 adds actual voting will be subject to "the same conditions" as are applicable for nationals of the host state, i.e., that the state may determine its own voting laws. Article 19 also declares that "detailed arrangements" to further define these rights are subject to a unanimous vote on the Council. Such arrangements are also subject to "derogations where warranted by problems specific to a Member State." Article 22 anticipates EU legislation "to strengthen or add to" the citizen rights offered by the EC Treaty, but such legislation will require a unanimous vote on the Council and separate ratification by each of the Member States according to their respective constitutional requirements.

Two directives have expanded on the provisions of EC Treaty Article 19. Council Directive 93/109[388] sets forth the conditions for an EU citizen to vote or stand for election as a candidate for the European Parliament. Most of the conditions are technical in nature, but Article 14 of the Directive permits a Member State to impose restrictions (based on length of residency) if more than 20 percent of eligible voters in the state are non-nationals.[389] The second directive is Council Directive 94/80,[390] which elaborates on the rights of EU citizens to vote and stand for office in municipal elections in the Member State in which they reside. There are two interesting restrictions in this Directive. Article 12(1) permits residency-length requirements if more than 20 percent of the voters in a Member State are non-nationals, and Article 5(3) permits a Member State to limit to its own nationals the right to serve as

[388] Council Directive 93/109/EC, Dec. 30, 1993, O.J. (L 329) 34.
[389] Id. at art. 14(1). For example, if the 20 percent threshold has been exceeded, a minimum residency period of up to 5 years may be imposed on non-nationals who wish to vote, and up to 10 years on non-nationals who wish to stand for election to the European Parliament.
[390] Council Directive 94/80/EC, Dec. 31, 1994, O.J. (L 368) 38.

"elected head, deputy or member of the governing college of the executive of a basic local government."[391]

In the area of citizen rights, Constitution Article II-101(3) provides that tort claims may be brought against the EU not under Union law, but "in accordance with the general principles common to the laws of the Member States." This mirrors Article 288 of the EC Treaty, which states that a tort claim brought against the Community by an EU citizen or any other party will be subject not to Union law but to the "general principles common to the laws of the Member States." Under Constitution Article II-106 the right to consular assistance from another Member State is based on that state's legal practices in dealing with its own nationals. This is a carryover from EC Treaty Article 20, which provides that the right to diplomatic or consular assistance from another Member State is subject to "the same conditions" as would apply to nationals of the assisting state. Under the Treaty and the Constitution the implication is that the assisting Member State will be entirely free to set its own rules and procedures for granting diplomatic or consular assistance both to its own nationals and to those of other EU Member States.

As defined in the Treaties and Constitution, EU citizenship is a carefully contained concept.[392] It supplements, but does not replace the national citizenship that is offered by the Member States. An EU citizen residing in a Member State where he or she is not a national citizen may enjoy many, but not all of the political rights granted to nationals of that state. Furthermore, the EU's ability to elaborate on the right to vote or stand for election in another Member State is subject to a unanimous vote on the Council, where any Member State can exercise a veto, and further subject to "derogations where warranted by problems specific to a Member State."[393] Likewise, the EU's ability to "add to the rights laid down in [Constitution] Article I-10" is subject to both a unanimous Council vote and the additional safeguard of separate ratification by each of the Member States.[394] The potential for derogations and the requirement of unanimity represent clear limits on the authority of the EU to define the rights of its citizens beyond the principles explicitly stated in the Constitution.[395]

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[391] Id. at arts. 10(1), 5(3).

[392] For an extended analysis of the rights attached to EU citizenship, see Dennis C. Mueller, Rights and Citizenship in the European Union, in Blankart, supra note 29, at 61-84.

[393] Constitution art. III-126.

[394] Constitution art. III-129.

[395] Jaap W. de Zwaan has commented that the EC Treaty's existing ratification requirement for expansion of citizen rights is "laborious" and comparable to the

3. THE BUDGET

3.1 **The EU's budgetary independence**

The European Union is not dependent on yearly contributions from its members. Rather, Article I-54 of the Constitution calls on the EU to provide itself "with the means necessary to attain its objectives and carry through its policies." Article I-54(2) states that the Union's budget "shall be financed wholly from its own resources." Pursuant to Constitution Article I-56, the EU is required to adopt an annual budget in accordance with elaborate procedures set forth in Article III-404 of the Constitution.[396] As is appropriate for an organisation whose primary business is business, Article I-53(2) requires that the revenue and expenditure shown in the budget "shall be in balance." Articles I-55 and III-402 require a five-year "multiannual financial framework" that sets annual ceilings for the various categories of expenditures. Once a budget has been set, Article I-53(5) mandates that the EU "shall not adopt any act which is likely to have appreciable implications for the budget without providing an assurance that the expenditure arising from such an act is capable of being financed within the limit of the Union's own resources and in compliance with the multiannual financial framework." In other words, the EU must live within its budget.

Many of the Constitution's budgetary principles are carried over from the EC Treaty. Article 268 of the treaty calls for an annual budget, which must be in balance. Article 269 requires the budget to be "financed wholly from own resources." Article 270 contains the elaborate expression found in Constitution Article I-53 requiring the EU to live within its budget. Articles 271 to 280 contain details about the process of adopting the budget. Despite these similarities, two new elements are noteworthy. First, the Constitution creates a multiannual financial framework, which is intended to provide more predictability and consistency in the EU's budgeting process. Second, under Article III-404 the European Parliament becomes a full participant in approving all aspects of the budget and in proposing amendments to it. Under Article 272 of the EC Treaty the Parliament's right to amend was limited to

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process of amending the treaty. Despite the sensitivity of these matters, De Zwaan states that "one could have hoped that a lighter procedure would have been included in the treaty." De Zwaan 2005, supra note 380, at 246 n.5.

[396] Article III-404 is located in a section entitled "The Union's Annual Budget" (arts. III-403 to III-406). This is followed by sections entitled "Implementation of the Budget and Discharge" (arts. III-407 to III-409), "Common Provisions" (arts. III-410 to III-414) and "Combating Fraud" (art. III-415).

compulsory expenditures.[397] The Constitution's approach adds a significant boost to the role of the Parliament.

Beyond actual creation of the budget, Constitution Article I-53 requires the Member States to cooperate in countering fraud relating to the EU's financial interests[398] and to work with the Union to ensure proper use of budgeted monies.[399] Similarly, EC Treaty Article 280 calls for Member State cooperation in countering fraud relating to the Community's financial interests, but the treaty lacks a broader mandate for the states to work with the Community to ensure proper use of budgeted monies.

The European Union's budgetary independence, and in particular its ability to finance its activities through its own resources, are a critical distinction between the EU and a typical intergovernmental organisation. An IGO has no taxing power and is typically dependent upon subscriptions, assessments or contributions from its members. Payment of such contributions may be mandated by the IGO's constituent treaty, but revenue comes only from the treasuries of the member states. The EU's financial framework is a key indicator of its unique status and its state-like nature.

3.2 **Elements of Member State control over EU finances**

Article I-54(3) of the Constitution requires that European laws "relating to the system of own resources of the Union" and those which create new categories of resources (as well as abolishing any existing category) are subject to both a unanimous vote on the Council and approval by the Member States in accordance with their national constitutional requirements. Furthermore, according to Constitution Article I-55(2), each multiannual financial framework must be unanimously approved by the Council.[400] This consensus-based framework will establish the approved categories of expenditures and the annual appropriations ceilings for each category for

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[397] EC Treaty Article 272(4), second subparagraph, provides that Parliament has a right "to amend the draft budget, acting by a majority of its Members, and to propose to the Council, acting by an absolute majority of the votes cast, modifications to the draft budget relating to *expenditure necessarily resulting from this Treaty or from acts adopted in accordance therewith.*" (emphasis supplied)

[398] Constitution arts. I-53(7), III-415.

[399] Constitution arts. I-53(6), III-407. The Member States are also required to take steps to "counter fraud affecting the Union's financial interests." Constitution art. III-415.

[400] However, note that a unanimous vote of the European Council can change this to approval by QMV. Constitution art. I-55(4).

periods of at least five years.[401] Finally, Constitution Article III-412(3) requires that until the end of 2006 the Council must vote unanimously to adopt certain financial rules relating to the EU budget.

The unanimity provisions in the Constitution are a reflection and amplification of the procedures contained in the EC Treaty. Article 269 of the treaty requires that provisions "relating to the system of own resources of the Community" are subject to both a unanimous vote on the Council and approval by the Member States in accordance with their national constitutional requirements. The multiannual framework is not found in the Treaties.

One commentator has criticised the unanimity requirement in budgeting as follows: "Unanimity is now required for all relevant decisions related to own resources. Majority voting only applies to implementing measures where specifically provided for in earlier unanimous decisions [Constitution art. I-54(4)]. In a Union of 25, with crucial decisions on financing on the horizon, this is far from satisfactory."[402] It might be that the requirement of Member State cooperation on own resources arises from the fact that substantial portions of the EU budget are passed along to the Member States in the form of financial support for agriculture and other programmes, and each state has great incentive to protect its share of the payment stream from Brussels.[403] But regardless of the motives or history that may lie behind the unanimity requirements, each Member State in the Union has a voice that must be heard in the process of determining categories of own resources. Neither the EU nor a majority of the other states can force a decision on own resources upon a member that has serious reservations. As a result, the financial independence that distinguishes the EU from a typical IGO is counterbalanced with a substantial protection left in the hands of each Member State.

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[401] Constitution arts. I-55(1), III-402(1).

[402] Giovanni Grevi, Light and shade of a quasi-Constitution – An Assessment, EPC Issue Paper No. 14, at 8-9 (June 23, 2004), available at http://www.theepc.net. For a socio-economic analysis of the challenges facing the EU in setting its future budgets, see Charles B. Blankart & Christian Kirchner, The Deadlock of the EU Budget: An Economic Analysis of the Ways In and Ways Out, in Blankart, supra note 29, at 109-38.

[403] Agriculture subsidies consume nearly half the EU budget. Chronology – EU Common Agricultural Policy, Reuters, June 26, 2003,
available at http:// www.forbes.com/business/newswire/2003/06/26/rtr1011815.html. For the authority to support agriculture, see Constitution art. III-228(2).

4. EXTERNAL ACTION

The Constitution anticipates the fact that the EU will have "relations with the wider world."[404] This phrase is not found in the Treaties, but the Treaties do mandate the Union to take action in a variety of international settings and for various purposes. The external action of the EU is examined in greater detail in Chapter 17, as one of the substantive areas of the Union's activity. It is briefly referenced here as one of the significant indicia of the EU's character, namely, that its Treaties and the new Constitution endow it with the state-like authority to carry out relations with the nations of the world and with international organisations.

As the analysis in Chapter 17 action will demonstrate, the authority of the EU to act in external matters is carefully limited, both in the existing Treaties and in the Constitution.

5. DESCRIPTION AND MANDATE OF THE EU INSTITUTIONS

5.1 **A state-like institutional framework**

a. Overview of the EU institutions

An overview of the EU's institutions is presented in Title IV of Part I of the Constitution, "The Union's Institutions and Bodies."[405] This title consists of two chapters, with Chapter I describing the principal EU institutions under the heading "The Institutional Framework."[406] Chapter II describes "The Other Union Institutions and Advisory Bodies."[407] It is important to note at the outset that Title IV provides important information about the institutions, but it is an overview only. Much more detail regarding the functioning of the institutions is relegated to Part III of the Constitution.[408]

According to Constitution Article I-19(1), the EU is to consist of "an institutional framework" comprised of the European Parliament, European Council, Council, Commission and Court of Justice.[409] As further discussed

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[404] Constitution art. I-3(4).
[405] Constitution arts. I-19 to I-32.
[406] Constitution arts. I-19 to I-29.
[407] Constitution arts. I-30 to I-32
[408] Constitution arts. III-330 to III-401.
[409] In the Constitution the European Council is always referred to with its full name, while in all provisions after Article I-19 the Council of Ministers is referred to as the

below, it is noteworthy that the Constitution deviates from EC Treaty Article 7(1) by including the European Council in the list of primary institutions, while at the same time shifting the Court of Auditors from this list to the category of "other institutions." In all instances, the Constitution requires each institution to act "within the limits of the powers conferred on it in the Constitution."[410] Following the introduction in Article I-19 there are separate articles describing each of the identified institutions. A single provision, Article I-20, describes the European Parliament. Articles I-21 and I-22 respectively describe the European Council and its President. Articles I-23 to I-25 describe the Council, its configurations and its system for qualified majority voting. The Commission, its President and the Union Minister for Foreign Affairs are described in Articles I-26 to I-28. The final article in this chapter is Article I-29, which introduces the European Court of Justice.

The Chapter I institutions are further covered in Part III of the Constitution as follows: the European Parliament in Articles III-330 to III-340; the European Council in Article III-341; the Council in Articles III-342 to III-346; the Commission in Articles III-347 to III-352; and the Court of Justice in Articles III-353 to III-381. Each of these institutions is discussed in greater detail in Chapter 13 of this treatise.

Chapter II of Title IV, consisting of Articles I-30 to I-32, describes the European Central Bank, the Court of Auditors and the EU's two official "advisory bodies," the Committee of the Regions and the Economic and Social Committee. Again, each of these bodies is further described in Part III of the Constitution, with the ECB being covered in Articles III-382 and III-383, the Court of Auditors in Articles III-384 and III-385, and the Committee of the Regions and the Economic and Social Committee respectively in Articles III-386 to III-388 and III-389 to III-392, In addition, the European Investment Bank is described in Articles III-393 and III-394.

The institutional provisions in the Constitution may be seen as an amplification of those found in the Treaties. EC Treaty Article 7(1) offers a formal list of the Community institutions, including the European Parliament, Council, Commission, Court of Justice and Court of Auditors. The Economic and Social Committee and the Committee of the Regions are mentioned in Article 7(2), but, as noted above, the European Council is not listed. As a later instrument that builds on the EC Treaty, the Treaty on European Union arguably does not require a specific elaboration of the institutional

"Council" and the European Commission is referred to as the "Commission." Constitution art. I-19(2). This treatise will generally follow those usage conventions.

[410] Constitution art. I-19(2).

framework, and a formal list is not included. However, at the beginning of the TEU, in its "Common Provisions," Article 3 states that "[t]he Union shall be served by a single institutional framework." Article 3 also mentions the Council and Commission and their responsibilities with regard to the EU's external activities. Article 4 then describes the European Council and how it operates, although it is not labeled as an EU "institution" or "body." TEU Article 5 mentions the European Parliament, Council, Commission, Court of Justice and Court of Auditors, not as part of a description of an institutional framework, but to make clear that these institutions must "exercise their powers" under both the EC Treaty and the TEU.

It is Part Five of the EC Treaty, Articles 189 to 280, that contains most of the Treaties' detail on the EU institutions. The European Parliament is covered in Articles 189 to 201, the Council in Articles 202 to 210, the Commission in Articles 211 to 219, the Court of Justice in Articles 220 to 245 and the Court of Auditors in Articles 246 to 248. Articles 249 to 256 contain provisions common to the institutions, including the co-decision procedure for legislation (Article 251) and the cooperation procedure (Article 252). The Economic and Social Committee is described in Articles 257 to 262, the Committee of the Regions in Articles 263 to 265, and the European Investment Bank in Articles 266 and 267. Financial provisions relating to the Community are included as the final section of Part Five, in Articles 268 to 280.

The institutional details provided in Part III of the Constitution[411] generally follow the approach of the provisions in Part Five of the EC Treaty,[412] and to some degree the institutional sections in Articles I-19 to I-32 of the Constitution resemble Articles 3 to 5 of the TEU. However the Constitution's overview of the institutions in its Part I is much more detailed than that in the TEU and is presented in a clearer, more straightforward and cohesive manner than either of the Treaties offers. It may be fair to criticise the constitutional text for dividing the institutional provisions between Part I and Part III – this separation requires the reader to move back and forth between the parts to get the complete picture – but the general presentation of the material in the Constitution is an improvement over the more random approach in the Treaties.

[411] Constitution arts. III-330 to III-401.
[412] EC Treaty arts. 189-267.

b. Institutional mandate and functions

According to Article I-19(1) of the Constitution, the purpose of the EU institutions is "to promote its [the EU's] values, advance its objectives, serve its interests, those of its citizens and those of the Member States, [and] ensure the consistency, effectiveness and continuity of its policies and actions." Each institution is further called upon in Article I-19(2) to act within "the limits of the powers conferred upon it in the Constitution, and in conformity with the procedures and conditions set out in it," and all of them are required to practice "sincere mutual cooperation." Specific responsibilities for each institution are discussed below. One of the Constitution's chief mandates for the institutions is to create law for the Union. Article I-33(1) states that the institutions are to use a variety of legal instruments in the course of exercising their competences. These legal instruments are described in Article I-33 and further defined in Articles I-33 to I-36, and they will be discussed in detail in Chapter 14.

Article 3 of the Treaty on European Union mandates the Union institutions to "ensure the consistency and the continuity of the activities carried out in order to attain [the Union's] objectives while respecting and building upon the *acquis communautaire.*" Article 3 also mentions the need for consistency in the EU's external activities and the responsibilities of the Council and Commission toward that end. The EC Treaty also contains a number of general provisions that describe the responsibilities of the Union's institutions. Note that these provisions refer to the Community rather than the Union, but the Union is brought in through Article 1 of the TEU.[413] EC Treaty Article 5 mandates the Community to act within its conferred powers, and subject to the principles of subsidiarity and proportionality. These principles are discussed in Chapter 12.[414] Article 7 notes that the Community's tasks are entrusted to its institutions, each of which must act "within the limits of the powers conferred upon it by this Treaty." The identified institutions are the European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors. Articles 8 and 9 expand on the institutional mandate by mentioning the European Central Bank and the European Investment Bank. Article 10 calls on the Member States to support the institutions in their work. Part Five of the EC Treaty[415] contains most of the detail on the institutions and their responsibilities, and Part Six mentions various responsibilities of the

[413] TEU Article 1 states: "The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty."
[414] See part 2 of Chapter 12.
[415] EC Treaty arts. 189-267.

Community in general or the Council and Commission acting on behalf of the Community.[416]

Article I-50(2) of the Constitution requires that "the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible." This makes concrete an aspirational statement in Article 1 of the the Treaty on European Union that decisions in the Union "are taken as openly as possible and as closely as possible to the citizen." The EU Parliament is required by Article I-50(2) to meet in public, as is the Council when it is "considering and voting on a draft legislative act." A specific requirement of open meetings is not found in the Treaties.

Article I-50(3) grants the public a broad "right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium." EC Treaty Article 255 offers public access to Community documents, although the only institutions mentioned are the Parliament, Council and Commission. Interestingly, the Constitution's wide sweep would include for the first time the European Council, which has heretofore operated without being subject to any right of access.

Notwithstanding the differences in how the Constitution describes the EU institutions, it is fair to say that – with the notable exceptions of the roles of the permanent European Council President and the Union Minister for Foreign Affairs – the new document would change very little with respect to the institutions' overall functions. The differences, if any, are discussed below with respect to each institution. The Constitution's method of organising and describing the broad institutional mandates is different from that of the Treaties, but the substance is the generally the same. One exception is that, as noted above, the public right of access to EU documents is expanded to include all EU institutions, bodies, offices and agencies. Furthermore, as described in Chapter 14, the forms of legislation and regulation available for use by the EU's institutions, as such are prescribed by the Constitution, represent a simplification from the varieties available under the Treaties.[417]

c. Authorisations granted to the EU institutions

To support the Union's activities, Constitution Article III-428 permits the Commission to "collect any information necessary and carry out any checks required for the performance of the tasks entrusted to it," pursuant to a

[416] EC Treaty arts. 281-314.
[417] See analysis in part 1 of Chapter 14.

European regulation or decision adopted by the Council by simple majority. A simple majority means a majority of the Council's component members.[418] Article III-429 allows the EU to compile statistics "necessary for the performance of the Union's activities," pursuant to a European law or framework law. However, the production of statistics is subject to certain guidelines and may not "entail excessive burdens on economic operators." The general permission to collect information is found in Article 284 of the EC Treaty, in terms essentially the same as Constitution Article III-428, and since qualified majority voting on the Council is not mentioned in Article 284, by its default rule the Council decision will be taken by a majority vote of its members.[419] The right to produce statistics is found in EC Treaty Article 286, whose terms are essentially the same as Constitution Article III-429.

Under Constitution Article III-427 the Union may, in a European law, set the employment regulations for its own officials and employees.[420] The constitutional provision mirrors Article 283 of the EC Treaty.[421] It is useful to note, however, that the EU employees are subject to EU regulations and are thus outside the employment laws of the Member States where the employees work. Under the Treaties and the Constitution the EU is given complete autonomy in this area.

The members of EU institutions and committees, along with all other Union officials and employees, are prohibited by Constitution Article III-430 from disclosing information "of the kind covered by the obligation of professional secrecy," and this obligation continues "even after their duties have ceased." Of particular concern is information "about undertakings, their business relations or their cost components." EC Treaty article 287 is identical in its operative terms. Interestingly, neither the Constitution nor the treaty specifies the source of these obligations or where they may be found. Unless further EU regulatory or legislative action is taken to identify the obligations, the source might be found in Member State law, EU law or some form of generally accepted principles.

The activities of the EU institutions are subject to review by a completely independent Ombudsman, who is first mentioned in Article I-10(2) of the Constitution, which describes the various rights that attach to EU citizenship. The office is generally described in Article I-49. The Ombudsman represents both the power of the European Parliament, who appoints him or

[418] Constitution art. III-343(2).
[419] EC Treaty art. 205(1).
[420] Constitution art. III-427.
[421] EC Treaty art 283.

her, and a sounding board for EU citizens. He or she is to "receive, examine and report on complaints about maladministration" of EU institutions and officials, and must be completely independent in carrying out this mandate.[422] Additional detail regarding the Ombudsman is found in Constitution Article III-335. The Ombudsman is elected by the European Parliament[423] and must operate pursuant to a "European law of the European Parliament," that has been approved by the Council.[424] While the Commission must be consulted on this law, the legislative initiative and enactment comes from the Parliament alone.[425] A brief reference to the Ombudsman is found in Article 21 of the EC Treaty, which identifies the rights of EU citizens. Article 195 of the treaty contains details similar to those in Article III-335 of the Constitution. A separate description like that of Constitution Article I-49 is not found in the treaty text. Under the Treaties and the Constitution the existence of the office reflects a measure of self-sufficiency in the EU institutions. The European Parliament has the ability to appoint the Ombudsman without consulting the Member States, and the Ombudsman can carry out his or her responsibilities without seeking the approval of the Member States. The Ombudsman's oversight of the EU institutions takes place exclusively at the Union level.

5.2 **The EU's institutions must respect the Member States**

Article I-19(1) of the Constitution mandates that the EU institutions must serve the interests of the Member States. This is consistent with Article I-5(1), which requires the EU, acting through its institutions, to respect the national identities of the Member States and their functioning as states.[426] Article I-11(1) provides that EU institutions must govern their actions by the principles of subsidiarity and proportionality, and Article I-11(3) elaborates that under the subsidiarity principle the institutions must limit themselves to actions whose objectives "cannot be sufficiently achieved by the Member States." Procedurally, the Constitution's Protocol on the Role of Member States' National Parliaments in the European Union (Protocol on National Parliaments) provides that the national parliaments must be advised of all proposed EU legislation and may issue a "reasoned opinion" if they believe that the subsidiarity principle is being violated.[427] Furthermore, pursuant to the Constitution's Protocol on the Application of the Principles of

[422] Constitution art. I-49.
[423] Constitution art. III-335(1).
[424] Constitution art. III-335(4).
[425] Constitution art. III-335(4).
[426] Constitution art. I-5(1).
[427] Protocol on National Parliaments, supra note 273.

Subsidiarity and Proportionality (Protocol on Subsidiarity), [428] if their objections do not obtain the desired results, groups of Member States may force reconsideration,[429] and any state may challenge the legislation in an action at the European Court of Justice.[430]

The constitutional provisions have several antecedents in the Treaties. TEU Article 6 requires the Union, and thus its institutions, to "respect the national identities of the Member States." Article 10 of the EC Treaty has been interpreted to impose on the Community a duty of "sincere cooperation" with the Member States.[431] EC Treaty Article 5 sets forth the principles of conferral, exclusivity, subsidiarity and proportionality as a check on EU power, and here too the test of subsidiarity is whether EU action "cannot be sufficiently be achieved by the Member States." Both the Protocol on National Parliaments and the Protocol on Subsidiarity have been appended to the Treaties since the Treaty of Amsterdam in 1997.[432] However, as noted in Chapter 12, the constitutional versions of these protocols provide a greater role for the Member State parliaments.[433]

Although the EU does have the power to run its own affairs, Articles III-432 and III-433 of the Constitution require that certain politically sensitive issues relating to Union institutions are subject to unanimous adoption. These include decisions on the seat of Union institutions, which must be approved by "common accord of the governments of the Member States,[434] and regulations governing the official use of languages within the institutions, which must be unanimously adopted by the Council.[435] The words of Article III-432 regarding a common accord decision to determine the seat of EU institutions are essentially identical to EC Treaty Article 289. The provisions of Article III-433 on a unanimous Council decision to govern the official use of languages in the EU institutions are also a direct carryover, in this case from EC Treaty Article 290.

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[428] Protocol on Subsidiarity, supra note 273. Also see Constitution arts. I-18(2), I-11(3), III-259.
[429] Protocol on Subsidiarity, supra note 273, art. 6. For comments on the expanded review rights for the national parliaments, see Kokott & Ruth, supra note 116, at 1334-35.
[430] Protocol on Subsidiarity, supra note 273, art. 7; Constitution art. III-365(2).
[431] See the Court of Justice ruling in Case C-2/88, Zwartveld, supra note 379.
[432] Protocol on National Parliaments, supra note 273. Protocol on Subsidiarity, supra note 273.
[433] See part 2 of Chapter 12.
[434] Constitution art. III-432.
[435] Constitution art. III-433.

Compared to the Treaties, the Constitution provides more emphasis on the EU having respect for the Member States and serving their interests. In addition, Peter Norman reports that the Protocol on National Parliaments and the Protocol on Subsidiarity were "beefed up somewhat" at the Convention "to increase the member states' safeguards against any centralising urges emanating from Brussels."[436] In the Constitution's version, the Protocol on National Parliaments contains more detailed procedures regarding the forwarding of proposed EU legislation to the parliaments for review and creates a right for the parliaments to send a "reasoned opinion" to the EU concerning compliance with the subsidiarity principle. The Constitution's Protocol on Subsidiarity adds the procedures by which national parliaments may object to legislative acts on subsidiarity grounds, force reconsideration, and ultimately challenge the legislation in an action at the Court of Justice. The principles of subsidiarity and proportionality and these protocols are further discussed in Chapter 12.[437]

There are two additional means by which the residual power of the Member States vis-à-vis the EU institutions is affirmed in the Constitution. First, the Union's activity is limited to what is conferred on it "by the Member States in the Constitution to attain the objectives set out in the Constitution."[438] Second, the Member States must unanimously agree to amend any part of the Constitution, including the institutional provisions.[439] The conferral principle and the amendment requirements are carryovers from the Treaties,[440] and both are the subject of further analysis below.[441]

6. STATE-LIKE ATTRIBUTES AND THE DIVIDING LINES

Of the subjects addressed this chapter, the matter most likely to impact the EU's dividing lines, at least in theory, is the enhanced legal status that the Constitution offers to the Union. Lack of legal personality for the Union (as opposed to the Community) has not really caused the Union to refrain from acting as its membership has wished, but the Union's new personality and its status as successor to the old Union and the Community suggest a new legal order and thus an invigorated entity that may be better

[436] Norman, supra note 152, at 252.
[437] See part 2 of Chapter 12.
[438] Constitution art. I-11(2).
[439] Constitution art. IV-443, IV-444, IV-445. See the discussion in Chapter 11.
[440] EC Treaty art. 5 (conferral); TEU art. 48 (amendment).
[441] See part 1 of Chapter 12 (regarding conferral) and Chapter 11 (regarding unanimity to amend the Constitution).

able to assert itself to the world and to its members. But is this really a movement of dividing lines, or is it just an outward makeover that does not expand EU competences? It is difficult to see any shift in competences in this regard. Likewise, will the ability of the new Union to more clearly and legally bind itself in international agreements mean that it will do so more frequently and to the detriment of Member State competences? Given the fact that other paths are currently open for the making of such agreements, there is little reason to conclude that the Constitution's textual clarification would have resulted in a significant increase in this type of activity.

In contrast, does the Constitution's new expression of the equality of the Member States somehow imply a limitation on EU competences? This must also be answered in the negative. In general, the same sorts of conclusions are appropriate with regard to the constitutional provisions addressing citizenship, budgetary affairs, external action and institutional matters.

In short, the state-like attributes of the Union under the Constitution are clarified and improved-upon, but they do not represent a meaningful shift in the EU's dividing lines.

Chapter 9

The EU as a Democracy

Historically, the Union's values and objectives and its state-like attributes have been recurring themes in the Great Debate on whether the Union is (or should be) essentially intergovernmental in nature or a federation in-the-making. This chapter will expand our consideration of one of the EU's stated values – democracy, and we will examine the democratic features embedded in the Union's processes and institutions. In an organisation itself comprised of democratic states, one might not expect that elements of democracy at the EU level would be controversial. Nevertheless, this subject has proven to be of significant interest, and it has in fact engendered philosophical disagreement.

1. IS DEMOCRACY REALLY NECESSARY AT THE EU LEVEL?

Article I-2 of the Constitution identifies democracy as a core value of the Union, as does Article 6(1) of the TEU. But democracy at what level? Is the intention to respect democracy within the Member States, or does it mean that democracy should be practiced within the institutions and activities of the EU itself?

We can posit that proponents of a vigorous intergovernmental theory would contend the following: The EU is and should remain a project of the Member States, with centralisation only as absolutely necessary to coordinate national action. Since the Union should be little more than a limited pooling of certain national resources, citizens of the Member States should not be very concerned about influencing the EU processes except through their national governments. Thus, democracy within the Union should flow naturally – and exclusively – from and through the democratic features of the Member

States.[442] In contrast, those who espouse the federal approach would see an increasing role for the Union in the lives of individual Europeans, and this would necessitate rights and procedures at the EU level to ensure citizen control. In other words, the new legal order developing in the EU demands a democratic approach, and the Union must be structured to enhance transparency, individual participation and a strong European Parliament.[443] Without these elements the system would suffer from a "democratic deficit."[444]

For an historical perspective, G.F. Mancini outlines four reasons why the European Community was not founded as a democratic institution. First, intergovernmental organisations (IGOs) "do not normally provide for much direct democracy in their decision-making apparatus;" rather, a measure of democracy exists through national parliamentary control over the state's representatives to the IGO.[445] Second, the Community's Member States were "anxious to circumscribe the surrender of national sovereignty within clearly defined limits."[446] Third, a full national-style parliamentary system was not deemed feasible, and therefore the early version of the European Parliament was limited to a consultative role.[447] Finally, an empowered parliament was seen as a hindrance to the desired IGO-inspired consensus approach to decision-making.[448] Nevertheless, the Community had its democratic

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[442] Lindseth urges that "we should not confuse formal democratisation of European institutions with democratic legitimacy. The Community remains, in essence, a supranational administrative body, the legitimacy of which derives from its ability to solve practical problems reasonably efficiently, as a regulatory agency of the Member States representing their particular national communities." Lindseth, supra note 34, at 683.

[443] Albert Weale, in his 1999 treatise on democracy, asserts that any "non-utopian" normative theory of democracy "is committed to the position that 'ought implies can.'" Christopher Lord, Assessing Democracy in a Contested Polity, 39 J. Common Mkt. Stud. 641, 644 (2001).

[444] The idea of a democratic deficit can be traced to David Marquand who in 1979 championed a strong European Parliament. See David Marquand, Parliament for Europe (1979). See also Yves Mény, De la democratie en Europe: Old Concepts and New Challenges, 41 J. Common Mkt. Stud. 1 (2002); Majone, supra note 77, at 6. For an extended analysis of the European Union's "democratic deficit" and how the Constitution will affect democratic rights and processes within the EU, see Stephen C. Sieberson, The Proposed European Union Constitution—Will it Eliminate the EU's Democratic Deficit?, 10 Colum. J. Eur. L. 173 (2004).

[445] Mancini, supra note 37, at 31-33.

[446] Id.

[447] Id.

[448] Id.

underpinnings. Jan Muller has observed that "the initial constituent power was a plural one: the member states, represented by their governments, engaged in elite bargaining, and made the political decision to constitute the Community. Consequently, there was a deficit of direct democracy from the very start, but there was no lack of a democratically constituted, plural constituent power."[449] Muller's comments would be echoed by the intergovernmental camp, who would contend that the original democratic underpinnings of the Community are sufficient for the EU today and in the future. Mancini strongly articulates the contrary, federalist position:

> Indeed, the Union is doomed never to be truly democratic as long as not only its foreign and security policies, which are openly carried out on an intergovernmental basis, but the very management of its supranational core, the single market, are entrusted, with or without a circumscribed control by the European Parliament, to diplomatic round tables. In other words, democracy will elude Europe as long as its form of government includes rules and legitimises practices moulded on those of the international community.[450]

Whether the European Union can or should manifest democratic elements depends both on the nature of the EU and the nature of democracy itself. The following section will examine first whether the Union possesses one of the building blocks of democracy, a *demos* – an identifiable people on which a democratic system can be based. Second, the analysis looks at whether there is an ideal form of democratic system to which the EU should aspire. Third, there is consideration of the practical issue of delegation as a necessary element of democracy in a complex society. After these inquiries, the Constitution and Treaties will be examined to identify elements of democracy that exist at the EU level, as well as areas in which the national democracies of the Member States are emphasised.

2. THE CHARACTER OF DEMOCRACY AT THE EU LEVEL

2.1 **Is there a *demos* on which a democracy can be based?**

In classic terms the basis for any democracy is the existence of a *demos*, an identifiable group of people with sufficient cohesiveness to agree on the principles of their self-governance.[451] Shared geography alone is not

[449] Muller, supra note 38, at 1790-91.
[450] Mancini, supra note 37, at 65.
[451] See general discussion in Neil MacCormick, Democracy, Subsidiarity, and Citizenship in the 'European Commonwealth', 16 Law & Phil. 331, 340-42 (1997).

enough to create the common culture or values that can give rise to a *demos*. Rather, the people within the territory must share a deeper common identity. With respect to the existence of a *demos* at the core of the European Union, commentators generally fall into three camps. The first contends that such a *demos* can never develop, and thus a true pan-European democracy cannot be created. The second argues that Europeans do possess sufficient shared values to constitute a *demos* that will support an EU democracy. A third camp suggests that this debate is unnecessary, and that the Union does not need a traditional *demos* as a prerequisite to supporting a democratic system. We will briefly examine each of these theories.

The case against the existence of a European *demos* begins with the empirical observation that Europeans are a diverse people with diverse values. Andreas Føllesdal makes reference to the lack of "a shared history or gene pool among all Europeans, to create a common identity" and sees that "there is no 'demos', no shared sense of destiny or broad set of common values."[452] He also sees "no sufficiently widespread and appropriate political culture" and "little in the way of sufficiently clear and shared normative conceptions of what justice requires regarding the institutional distribution of political rights and material resources."[453] Andrew Moravcsik notes that multilateral bodies such as the EU "lack the grounding in a common history, culture and symbolism upon which most individual polities can draw."[454] One of the greatest concerns to some commentators is the absence of a common European language. Dieter Grimm, a justice of the German Federal Constitutional Court, sees the language problem as "the biggest obstacle to Europeanisation of the political substructure, on which the functioning of a

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Democracy has been described as "the power of the demos." Yves Mény, supra note 444, at 3.

[452] Andreas Føllesdal, Citizenship and Political Rights in the European Union: Consensus and Questions, Institute for Advanced Studies, 1, 4, available at http://www.ihs.ac.at/public_rel/kbericht/ak1/fo.html [hereinafter Føllesdal IAS]. For a general discussion of the "no *demos*" theory, see Brand, supra note 19, at 7-17.

[453] Føllesdal IAS, supra note 452, at 12-13.

[454] Moravcsik 2003, supra note 95, at 38. Maltese Convention delegates George Vella and Alfred Sant have argued that "the diversity of cultures, languages, traditions, beliefs and historical backgrounds, found in the present and future member states of the EU, is the strongest factor against the claim that the EU should assume the structures of a federal superstate." Jesmond Bonello, Draft EU Constitution: MLP Sees Voluntary Withdrawal Clause as 'Interesting', Times Malta, May 28, 2003, at http://www.timesofmalta.com/core/article.php?id=127081. Joschka Fischer, an ardent proponent of further EU integration, likewise acknowledges that the Member States remain as the repository for citizens' identity and loyalty. Fischer, supra note 65, at 7.

democratic system and the performance of a parliament depends."[455] He asserts that effective democracy depends on effective communication, and that a shared language is critical.[456] G.F. Mancini agrees. He acknowledges that multi-language nations do exist, but he asserts that the size of the EU and the number of its languages create unprecedented challenges for democratisation.[457]

Population movement throughout history demonstrates that people are capable of shedding languages and nationalities while embracing new cultures. As an example, the Europeans who emigrated to the United States during the 19th century were generally successful in leaving the "Old World" behind and blending into the evolving American *demos*. But their willingness and ability to take on a new identity were spurred by the desperate economic or political conditions that led to emigration and by the dramatic impact of a physical relocation. It cannot be expected that today's Europeans who remain in their homelands during relatively comfortable economic circumstances will have the same motivation to let go of their national identities and personally accede to a pan-European *demos*. Joschka Fischer agrees that in these circumstances the nation states of Europe are "realities that cannot simply be

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[455] Dieter Grimm, Does Europe Need a Constitution?, 1 Eur. L.J. 282, 295 (1995). See also the analysis by G.F. Mancini, who observes that multi-lingual European states such as Belgium, Switzerland and Finland do exist, but are relatively small compared to the totality of the EU. In light of the Union's daunting language problem, Mancini concludes that the EU's democratic deficit "is therefore inborn and cannot realistically be removed within a time-frame which is other than geological or, at the very least, epochal." Mancini, supra note 37, at 56 (2000). Mancini notes that these temporal adjectives were used "ironically, but quite correctly in my opinion" by Joseph H. H. Weiler. Id. at 56 n.29. See Joseph H. H. Weiler, Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision, 1 Eur. L.J. 219, 229 (1995) [hereinafter Weiler 1995].

[456] "Communication is bound up with language and linguistically mediated experience and interpretation of the world. Information and participation as basic conditions of democratic existence are mediated through language." Grimm, supra note 455, at 292.

[457] Mancini, supra note 37, at 56. Mancini observes that multi-lingual European states such as Belgium, Switzerland and Finland are relatively small and manageable compared to the EU. In light of the Union's daunting language problem, Mancini concludes that the EU's democratic deficit "is therefore *inborn* and cannot realistically be removed within a time-frame which is other than geological or, at the very least, epochal." Id. at 56. Mancini notes that these adjectives were used "ironically, but quite correctly in my opinion" by Joseph H.H. Weiler. Id. at 56 n.29. See Weiler 1995, supra note 455, at 229.

erased" by the process of European integration.[458] Similarly, Alan Branthwaite sees "little evidence of European identity being able to offer a compensatory identity to replace national identities."[459] He describes the EU as "an artificial entity for which there are no natural feelings or sympathy."[460] Likewise, it has been argued that "the average voter will always relate far more to his national political institutions" than to the EU.[461] In this vein Peter Lindseth has asserted that "as long as political identity continues to cling to the nation state . . . the status of the EC/EU as a self-legitimating 'constitutional' level of governance will remain tenuous."[462]

A number of observers have dismissed the "no *demos*" argument by asserting that Europeans in fact share certain deeply-held principles. Former French Prime Minister and current MEP Michel Rocard has described "the extraordinary community constituted by the intellectual and cultural patrimony that unites Europeans around recognised and accepted values."[463] Among these values are "respect for human life, the desire to protect the weak and the oppressed, equal treatment of women, the commitment to the rule of law" as well as liberty of thought, religious freedom and pluralism, and Rocard heralds these principles as the nearly unanimously-accepted "pillars of political and institutional stability in today's Europe."[464] He might well have

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[458] In commenting on the "the transition from a union of states to full parliamentarisation as a European Federation" Fischer notes that such a level of integration is highly controversial: "Of course, this simple solution is immediately criticized as being utterly unworkable. Europe is not a new continent, so the criticism goes, but full of different peoples, languages and histories. The nation-states are realities that cannot simply be erased, and the more globalisation and Europeanisation create superstructures and anonymous actors remote from the citizens, the more the people will cling on to the nation-states that give them comfort and security." Fischer, supra note 65, at 7. Fischer states that he shares these objections, and therefore he endorses the idea that Member States should have in an integrated Europe. Id. at 7.

[459] Alan Branthwaite, The Psychological Basis of Independent Statehood, in States in a Changing World 46, 60 (Robert H. Jackson & Alan James eds., 1993).

[460] Id.

[461] Charlemagne, Europe's Forgotten President: Why It Matters Who Runs the European Parliament, Economist, Jan. 12, 2002, at 49.

[462] Lindseth, supra note 34, at 644. Lindseth engages in an extensive analysis of democratic legitimacy and the "no demos" theory. Id. at 645-51, 672-83.

[463] Michel Rocard, Europe's Secular Mission, Taipei Times, May 28, 2003, at 9, available at http://www.taipeitimes.com/News/edit/archives/2003/05/28/2003053028.

[464] Id. Rocard notes the influence of Christianity on the development of these shared values, but he adds that "Europe also found a productive balance between church and state. In Europe, sovereignty belongs to the people and does not flow from a transcendent power . . ." Id.

quoted Article 6(1) of the TEU, which states: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles *which are common to the Member States*." (emphasis supplied) Andreas Føllesdal refers to a "shared sense of justice,"[465] and social philosopher Jurgen Habermas has spoken of "the idea of Europe" being based on a "specific notion of justice" as manifested in "the social welfare state and the social market economy."[466] These ideas suggest that a deeper bond already exists among EU citizens,[467] and the European Community itself in 1973 attempted to recognize this bond in its "Declaration on the European Identity," which stated that the Member States at that time shared "the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual."[468]

A third approach is to suggest that the EU does not actually require a *demos* in the classic sense. Lothar Funk contends that the EU is a unique polity that "does not need citizens with a predominantly European identity" in order to be as legitimate as the Member States.[469] Eric Stein agrees and argues that since the EU is not a state in the traditional sense, "it does not need the underpinning of a single 'people.'"[470] Likewise, Lindseth proposes that a redefinition of *demos* may be necessary for the concept of democracy to adequately apply to an institution such as the EU that exists outside the

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[465] Føllesdal IAS, supra note 452, at 4.

[466] Jurgen Kaube, Espresso and Croissants, Frankfurter Allgemeine Zeitung, June 27, 2001, available at http://www.faz.com/IN/INtemplates/ AZ/archive.asp?rub={B1311FFE-FBFB-11D2-B228-00105A9CAF88}&doc={7E646849-6AE3-11D5-A3B5-009027BA22E4}.

[467] It has also been argued that greater public participation in the EU's processes and institutions will engender a deeper European identity. EU trade commissioner Pascal Lamy and French official Jean Pisani-Ferry have suggested that formation of effective multi-national political parties within the Parliament may give rise to "a truly pan-European civil society that can bring life to pan-European debates." Pascal Lamy & Jean Pisani-Ferry, Europe's Future and the Centre-left, Fin. Times (London), Mar. 8, 2002, at 19. In contrast, Andrew Moravcsik describes as "questionable" the proposition that "greater participation in European political institutions will generate a deeper sense of political community in Europe…." Moravcsik 2002, supra note 95, at 615.

[468] Commission of the European Communities, Declaration on the European Identity, (1973) EC Bulletin 12, Cl. 2501, 118-127. For thoughts on the European identity from the perspective of a scholar from one of the new Central European Member States, see Priban, supra note 81.

[469] Funk, supra note 81.

[470] Eric Stein, International Integration and Democracy: No Love at First Sight, 95 Am. J. Int'l L. 489, 526 (2001).

traditional concept of the nation-state.[471] Antonio Estella argues: "The important thing is not whether a *demos* exists; the important thing is that the pact is in equilibrium, that is, that a positive-sum game situation is created for all players."[472]

Reflecting on the debate, Stein questions whether the search for a *demos* may be a red herring, but he does recognise that something uniquely European is developing. In describing this "hopeful vision" he states: "Elements of what might emerge as a 'European identity' may be in place, but if this evolves, it will differ from, and will coexist with, the discrete identities of the peoples in the individual member states."[473] This idea of coexisting identities or attachments is explored by Joseph Weiler, who describes the concept as that of "multiple *demoi*."[474] He describes several versions of this theory, and they share the following characteristics: "[T]he invitation is to embrace the national in the in-reaching strong sense of organic-cultural identification and belongingness and to embrace the European in terms of European transnational affinities to shared values which transcend the ethno-national diversity."[475]

2.2 **Can pure democracy exist in the EU?**

Whether a *demos* exists in the EU or is even necessary, a second threshold question is whether there is an ideal form of democracy that can be identified for the European Union or for any society. Whether described with reference to the Greek *polis*, the New England town or the Westminster model,[476] the pure majoritarian government "of the people, by the people, for

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[471] Lindseth, supra note 34, at 643. See also Kenneth Armstrong, Civil Society and the White Paper: Bridging or Jumping the Gap? (Harvard Jean Monnet Working Paper No.6/01, 2001), http://www.jeanmonnetprogram.org/papers/01/011601.html.

[472] Antonio Estella, Constitutional Legitimacy and Credible Commitments in the European Union, 11 Eur. L.J. 22, 26 (2005).

[473] Stein, supra note 470, at 528. See also Di Fabio, supra note 112, at 168. Note also Alan Branthwaite's reference to an EU identity that might be "complementary" to national identities. Branthwaite, supra note 459, at 60.

[474] Weiler, supra note 29, at 344-448.

[475] Id. at 346.

[476] "The Westminster model (which originated in Great Britain about three hundred years ago) concentrates power in the hands of cabinet ministers, and particularly the prime minister. The central attribute of this model of government is the individual and collective responsibility of ministers to Parliament (and of Parliament to the people)." W.T. Stanbury, Accountability to Citizens in the Westminster Model of Government: More Myth Than Reality, Fraser Inst. Digital Publication (Feb. 2003), available at http://www.fraserinstitute.ca/admin/books/files/westminster.pdf. Also, for a useful

the people" is proffered as a hope, an intention and a goal. But in the world of reality this magnificent aspiration is exposed as no more than an elusive abstraction. Yves Mény has branded Lincoln's famous Gettysburg phrase as a highly "misleading" motto that has unfortunately come to define "the ideal form of democracy conceived by citizens."[477] Joseph Weiler states that "democracy can not exist in a modern polity" as it might in the ideal community.[478] Giandomenico Majone has characterised the "pure majoritarian" model of democracy as one standard that the Union will not be able to meet,[479] but Mény insists that "all of today's democracies are 'impure'."[480] He contends that the EU's prospects for democracy should be viewed with no more scepticism than more recognized democratic systems.[481] In a further commentary, published after finalisation of the Constitution's text in the fall of 2004, Mény observes: "The EU is not yet the traditional democratic polity that we have become used to (rather recently by the way!), but it is a democracy in the making. It is imperfect, to be sure. But then so is democracy itself."[482]

The impossibility of attaining the democratic ideal arises from the practical fact that democracies are institutions created by finite human beings operating under the constraints of culture, geography, time and the politics of the moment.[483] For Europe, one of its defining characteristics is its variety, from the rich diversity of ethnic and linguistic groups, to the dramatic differences in climate and topography and the ever-changing economic and geopolitical picture. Creating a widely accepted and stable system of government for such a continent is no small task. The fact that there are different governmental traditions within the EU only compounds the challenge for the Union. All of the Member States are democracies, but in

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historical analysis of the relationship between democracy and sovereignty, see Newman, supra note 42, at 4-15.

[477] Mény, supra note 444, at 3.

[478] Weiler, supra note 29, at 81.

[479] Majone, supra note 77, at 6.

Majone classifies current democratic deficit arguments into four groups, based on the underlying standards used: "Standards based on the analogy with national institutions; Majoritarian standards; Standards derived from the democratic legitimacy of the Member States; [and] Social standards." Id.

[480] Mény, supra note 444, at 3.

[481] Id. at 12.

[482] Yves Mény, The Achievements of the Convention, 14 J. Democracy 57, 70 (2003).

[483] Even the meaning of "democracy" is variable by era and location. "The very same word applies to the Athenian government, to de Tocqueville's America, to the British or continental parliamentary systems, to the new political systems emerging from the collapse of communism, etc." Mény, supra note 444, at 10.

different forms. Jan Muller observes that "in Britain, the Crown in Parliament is sovereign, in France, it is the state, representing the sovereign people, and its common national will. Finally, in Germany, the constitution is interpreted through the Federal Constitutional Court as the final arbiter."[484] Eric Stein describes "the consensual (consociational) pattern in the Netherlands [where it is known as the "polder model"[485]], Belgium, Austria and Switzerland…the strong regionalism in Spain… [and] the federal variants in Germany, Austria, Belgium, and Switzerland."[486] In the face of these divergent approaches, and against the backdrop of Europe's broad diversity, Yves Mény argues: "The legitimacy battle over who does what, at which level and according to which rules will be with us forever."[487] He sees an EU that will never be a "rational, well-ordered, uniform type of polity," but rather a system in constant motion.[488] He asserts that "we have to accept changes, disparities and differences over time and space, and not consider this a traumatic situation" and he adds that the Union can survive "only by accepting—and organising—these variations, be they beliefs, rules or institutions."[489]

Setting aside the ideal and embracing a flexible approach need not imply that there are no measurable standards for democracy in the European Union. Joseph Weiler asserts that "democracy can be measured by the closeness, responsiveness, representativeness, and accountability of the governors to the governed."[490] In similar terms, Michael Newman writes that "non-governmental opinion needs to be able to influence outcomes, expose injustice and incompetence, and offer alternative policies based on information about current policy failures."[491] These are useful concepts, but still abstract. Newman acknowledges that "such notions are exceedingly difficult to implement in *practice* in most political systems, and that there are particular problems involved in applying them within the EU."[492] More concrete standards and measurements are called for, and Andrew Moravcsik

[484] Muller, supra note 38, at 1779.
[485] Historically, all elements of Dutch society needed to cooperate just to protect the country from the sea, to build dikes and to reclaim land (polder). More recently, the economic policy-setting cooperation among employers' organisations, labour unions and the government has been referred to as the polder model. Mark Kranenburg, The political branch of the polder model, NRC Handelsblad (July 1, 1999) available at http://www.nrc.nl/W2/Lab/Profiel/Netherlands/politics.html.
[486] Stein, supra note 470, at 489-95.
[487] Mény, supra note 444, at 12.
[488] Id. at 12.
[489] Id.
[490] Weiler, supra note 29, at 81.
[491] Newman, supra note 42, at 173.
[492] Id.

argues that in order to be fair, "any useful and realistic assessment of the EU's democratic performance must be based on a comparison with the actual functioning of national democracies."[493] In an elaborate analysis, Christopher Lord proposes two methods of creating appropriate standards. First, he suggests that "benchmarks for democratic performance used elsewhere [i.e., in other systems] should be adapted to the specific case of the EU."[494] Second, he examines self-assessments and peer reviews gleaned from a wide array of reports and other documents issued by the various EU institutions.[495] Lord theorises that further studies utilising these two approaches will yield "a series of grounded and discriminating assessments of where in the EU's political system, and in relation to what democratic standards, problems are most acute or solutions most developed."[496]

2.3 **Delegation and its impact on democracy**

Regardless of the standards by which European Union democracy is to be measured, it is a certainty that delegation will be part of the system, as it is in any modern, functioning democracy. In a large and complex society it is simply a practical necessity to use elected and appointed representatives to carry out the task of governing, as an alternative to direct action by the citizenry.[497] There are two basic types of delegation. At the first level, individuals are elected by popular (democratic) vote to legislative bodies or executive positions, and these representatives carry out their responsibilities with the knowledge that they will in due course be required to stand again for election. At the second level, elected representatives appoint civil servants

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[493] Moravcsik 2003, supra note 95, at 38, 45.

[494] Lord, supra note 443, at 645. These benchmarks include (1) distinguishing among "competing models of Euro-democracy" offered by academics and practitioners, including majoritarian, consensus and participatory classifications, (2) identifying indices of democratic performance for each model, (3) specifying units of assessment, and (4) setting standards of evidence. Id. at 645-48.

[495] Id. at 648-56.

[496] Id. at 657.

[497] Yves Mény describes the "major intellectual shift" that occurred at the time of the American and French Revolutions: "Up until these major political changes, there was a general consensus about, on the one hand, the eminent quality of democracy (the best possible regime) and, on the other hand, its intrinsic limitation (democracy, it was argued, unfortunately can work only in tiny states and cities). The 'miracle' resulted from the combination of the representative principle with the democratic principle into something that was still called 'democracy', but had little to do with what the enlightenment had in mind." Mény, supra note 444, at 11. Joseph H. H. Weiler puts it succinctly: "Representative democracy replaces direct participation." Weiler, supra note 29, at 81.

who carry out executive, administrative and judicial tasks and are subject, not to future elections, but to rules of administrative procedure and standards of good behavior.[498] It is this second type of delegation that engenders most of the debate about the democratic legitimacy of any system of government, and of the European Union in particular.[499]

Delegation to administrative agencies is both widespread and functional. Peter Lindseth has commented that "[t]he practice of delegation is so common in modern administrative states that one could probably describe it as 'universal.'"[500] Likewise, Giandomenico Majone asserts that "the pure majoritarian model of democracy is the exception rather than the rule" and that "most democratic polities . . . rely extensively on non-majoritarian principles and institutions."[501] Andrew Moravcsik explains that non-majoritarian bodies, insulated from public pressure, offer much-needed efficiency and expertise, impartial dispensation of justice, protection of minorities, and unbiased representation of majority interests.[502] Majone also sees delegation as a means of managing the "deep cleavages" in a system such as the European Union, where "a strict application of majoritarian standards

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[498] There are regional variations as to which governmental positions are elected and which are appointed. In the United States, for example, in some jurisdictions the offices of sheriff, city attorney and even trial and appellate judges may appointed, while in others they may be elected.

[499] Note that Articles 202 and 211 of the EC Treaty specifically provide for the Council of Ministers (elected officials who represent the first level of delegation from the European citizens) to delegate to the Commission the right to adopt specific EU laws (the second level of delegation).

[500] Lindseth, supra note 34, at 645.

[501] Majone, supra note 77, at 11. Yves Mény writes: "An endless number of institutions which are at the heart of democratic systems are in fact not democratic (central banks, judiciaries, professional bodies with regulatory powers, etc.)…." Mény, supra note 444, at 9.

[502] Moravcsik 2002, supra note 95, at 613-14. Moravcsik also asserts that "non-majoritarian decision-making is justified in democratic theory not simply because it may be efficient, but because, ironically, it may better represent the long-term interests of the median voter than does a more participatory system—in distributive conflicts as well as matters of efficiency. Moravcsik 2000, supra note 36, at 311. Majone comments that "one of the important tasks of EC institutions has always been to protect the individual rights created by the Treaties, even against the majoritarian decisions of a Member State or the unanimous preference of all the Member States. EC competences [i.e., delegated authority] that serve to protect such rights are legitimated, and limited, by this function." Majone, supra note 77, at 23. Yves Mény concurs: "Power has to originate in the people. But, in a representative system, the minority has to be protected from the excesses of the majority." Mény, supra note 444, at 9.

would only produce deadlock and possibly even disintegration."[503] Beyond these practical benefits, Majone sees the delegation of authority as a manifestation of the delegating parties' commitment to the system.[504] In this view, the yielding of sovereignty from elected bodies to more independent administrative institutions ensures greater consistency and continuity of policy, and thus represents a greater endorsement by the electorate of their public officials.[505]

Common as it is, and useful as it may be, delegation is a two-edged sword. The very act of delegating to an administrative agency is a transfer of power away from individual citizens and a setting-aside of the principle of decision by majority vote. Inevitably there are times in any society when the electorate, the media and even other public officials will lash out at the "bureaucrats" who seem too removed from the people they are supposed to serve. Majone acknowledges the challenges posed by institutions "which by design are not directly accountable to the voters or to their elected representatives."[506] Lindseth has noted that despite the widespread practice of delegation in modern administrative states, "the power of unelected administrators to make regulatory norms—notably the power to make general rules in a quasi-legislative sense—is inescapably problematic from the standpoint of democratic legitimacy."[507] Within the European Union, the presence of non-majoritarian institutions has been described as "the conflict between bureaucracy and democracy, which is really at the heart of the present political and economic malaise across Europe."[508] The extent of delegation is thus a key point of contention in the debate over the proper structure for the European Union. A proper balance between efficient operation of government and popular control over core policy decisions is

[503] Majone, supra note 77, at 11. Majone describes the cleavages as "linguistic, geographical, economic, ideological and, especially, the division between large and small Member States." Id.
[504] Id. at 17.
[505] Majone states: "Because a legislature or a majority coalition cannot bind a subsequent legislature or another coalition, public policies are always vulnerable to reneging and hence lack credibility. Delegation to politically independent institutions is one method of achieving credible policy commitments." Id. at 17.
[506] Id. at 15. Majone also acknowledges the perception that independent regulatory agencies "do not fit well into the traditional framework of controls, checks and balances." Id.
[507] Lindseth, supra note 34, at 645.
[508] Anatole Kaletsky, EU Blueprint Spells the Demise of Democracy, Times London, Oct. 31, 2002, at 24.

sought by all sides,[509] but the precise form of that balance is where the divergence occurs. Those who would espouse a greater the role for the Commission must acknowledge that this will result in further removing decision-making from the European citizenry. On the other hand, those who would urge greater power for the European Parliament or Council must recognise that democratic procedures – and politics – are likely to yield a loss of efficiency. The picture is further complicated by the fact that in a complex system such as the EU, delegated administration and its oversight are spread among different levels of government,[510] and thus, the possibilities for adjusting the structure are seemingly endless.

3. DEMOCRACY AT THE EU AND NATIONAL LEVELS

3.1 **Democratic elements in the Union**

To emphasise the benefits of EU citizenship, Part I of the Constitution contains a boldly expressed section, Articles I-45 to I-52, entitled "The Democratic Life of the Union." It begins with a mandate in Article I-45 for the EU to treat all of its citizens equally, but much more interesting from a structural point of view are provisions of Articles I-46 and I-47 that underscore the Union's commitment to the principles of "representative democracy" and "participatory democracy." These articles guarantee citizens the right of direct representation at the Union level in the European Parliament, the right to "participate in the democratic life of the Union," the right to have EU decisions taken "as openly as possible and as closely as possible to the citizen" and the right to act through EU-level political parties.[511] Citizens are also promised a public forum for their views, access for their representative associations, broad consultation from Union officials and

[509] Peter Lindseth writes of the need for a "broader scholarly discussion of the appropriate means of controlling delegated normative power in any supranational body…." Lindseth, supra note 34, at 643. Francesca Bignami describes the challenges of achieving balance as follows: "A legislature that exercises too much oversight might very well slow down administrative action, render it partial, or compromise the scientific character of decision-making. Similar consequences follow from an administrative process that is too swift, relies too heavily on expert opinion, or is overly concerned with fairness. The aim is to achieve a balance, one that is not simply a matter of technocratic virtuosity but also depends on collective perceptions as what that balance should be." Francesca E. Bignami, The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology, 40 Harv. Int'l L.J. 451, 460 (1999).

[510] Moravcsik 2003, supra note 95, at 42.

[511] Constitution art. I-46.

a right of initiative.[512] In the remaining Articles of this section, the Constitution addresses issues such as EU dialogue with "social partners,"[513] the work of a Union ombudsman,[514] a requirement of open meetings by most Union institutions, access to EU documents,[515] a right of personal data protection[516] and respect for the national status of churches and non-confessional organisations.[517]

The Treaty on European Union mentions democracy, but only as an aspiration. The treaty's preamble identifies democracy as a principle to which the people of Europe are attached, and it expresses their desire to "further the democratic and efficient functioning of the institutions." Article 1 refers to a union in which "decisions are taken as openly as possible and as closely as possible to the citizens." Article 6(1) declares that the Union is founded on the principle of democracy, along with "liberty" and "respect for human rights and fundamental freedoms, and the rule of law." Article 11(1) notes that development and consolidation of democracy is an objective of the EU's common foreign and security policy. The TEU does not contain any substantive provisions relating to the practice of democracy at the Union level.

The EC Treaty notes that fostering democracy is an objective of the Community's external relations,[518] but this treaty also addresses in concrete terms certain aspects of EU-level democracy that are covered by Articles I-45 to I-52 of the Constitution. For example, EC Treaty Articles 189 and 190 include the right of direct representation in the European Parliament, and Article 191 includes recognition of the importance of EU-level political parties. The EC Treaty does not mention access for "representative associations" or "social partners," or respect for the national status of churches and non-confessional organisations, and civil society is mentioned only in EC Treaty Article 257 as one of the groups represented on the EU's Economic and Social Committee. The EC Treaty does not mandate open

[512] Constitution art. I-47.
[513] Constitution art. I-48.
[514] Constitution art. I-49.
[515] Constitution art. I-50.
[516] Constitution art. I-51(1). Data protection is also required of Member States when carrying out EU-mandated activities. Constitution art. I-51(2).
[517] Constitution art. I-52. In fact, the EU is required to maintain regular, open and transparent dialogue with churches and similar organisations. Constitution art. I-52(3).
[518] EC Treaty arts. 177(2) (regarding development cooperation), 181a(1) (regarding economic, financial and technical cooperation with third countries).

meetings or taking decisions as openly as possible,[519] but Article 255 guarantees public access to documents of the Council, Commission and Parliament, and Article 207 requires the Council to set rules for access to its documents. Personal data protection is referenced in Article 286 of the EC Treaty, but the treaty does not articulate the right of protection in terms as strong as those found in Constitution Article I-51. Lastly, the EC Treaty contains no right of public initiative, as offered in Article I-47(4) of the Constitution.

The primary difference between the Constitution and the Treaties is one of emphasis. The Treaties do not contain a cohesive section on the democratic life of the Union, do not use the Constitution's terms "representative democracy," "participatory democracy" or "democratic life of the Union," and do not refer to the Community or Union in any other term relating to democratic principles. The Constitution also recognises for the first time the rights and status in the EU of representative associations, social partners and civil society, as well as the national status of churches and other such groups. Open meetings of EU institutions are offered in some circumstances, and access to EU documents is increased. The right of public initiative is also introduced, although the editors of the *European Law Review* have expressed their "particular ire for the ridiculous citizen initiatives" in the following terms:

> This gimmick reeks of crass populism, as it allows minority interests representing less than a third of one per cent of the Union population to hijack Commission legislative resources. It forgets that the point of political institutions is that we pay them and hold them to account for exercising their judgment on these matters, not for kowtowing to newspaper editorial initiatives.[520]

A classic intergovernmental organisation does not offer citizenship, and neither does it offer its own democratic rights and processes to the citizens of its member states. Certain of the benefits offered by an IGO to its member states may well flow through the states to their citizens, and the operating rules of the organisation may offer a measure of openness and access to the public, but the organisation does not offer traditional rights at the

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[519] Note, however, that the European Council has recently decided that certain meetings of the Council of Ministers shall be open to the public. This decision is taken under the Treaties, but without a specific textual mandate in the Treaties. See note 10 supra and accompanying text.

[520] Editorial, A Constitution Whose Bottle is Definitely Half-Full and Not Half-Empty, 28 Eur. L. Rev. 449 (2003).

IGO level. The uniqueness of the European Union is emphasised by the fact that it has adopted a variety of democratic principles for the benefit of EU citizens and for improving their oversight of EU institutions. In this instance the Constitution absorbed the principles previously included in the Treaties and both extended the substance of the principles and dramatically increased the prominence with which they are presented.

The expansion of democratic principles in the Constitution is arguably one of the most significant innovations proposed by the Convention and the IGC, and the need for this expansion was a motivating factor behind the Convention.[521] When the Commission published its White Paper on European Governance in 2001, it based its sweeping proposals for EU institutional reform on "principles of good governance," including openness, participation and accountability.[522] These principles were described as the underpinning of democracy, not only for the Member States, but also for the Union.[523] The White Paper added: "Democracy depends on people being able to take part in public debate. To do this, they must have access to reliable information on European issues and to be able to scrutinise the policy process in its various stages."[524] The Commission insisted that both the EU institutions and the Member States "need to communicate more actively with the general public on European issues" and that information "should be presented in a way adapted to local needs and concerns, and be available in all official languages."[525] Later in 2001 the European Council met in Laeken, Belgium, and issued its Declaration on the Future of the European Union.[526] The Laeken Declaration noted that the EU "derives its legitimacy from the democratic values it projects, the aims it pursues and the powers and instruments it possesses" as well as from its "democratic, transparent and efficient institutions."[527] The Declaration described a need for the EU "to become more democratic, more transparent and efficient" and mandated the Convention to resolve the challenge of "how to bring citizens . . . closer to the European design and the European institutions."[528] The Declaration also

[521] The Laeken Declaration stated: "The first question is . . . how we can increase the democratic legitimacy and transparency of the present institutions." Laeken Declaration, supra note 143, at 23.
[522] White Paper, supra note 52, at 10.
[523] Id.
[524] Id. at 11. The Laeken Declaration also called on EU institutions to be more open. Laeken Declaration, supra note 143, at 20.
[525] White Paper, supra note 52, at 11.
[526] Laeken Declaration, supra note 143, at 19, 20.
[527] Id. at 22-23.
[528] Id. at 21.

set forth a lengthy list of questions illustrating the need to "increase the democratic legitimacy" of the EU's institutions.[529] These questions were intended to serve as themes for the Constitutional Convention that the Declaration instituted.[530]

Demands for more democracy and transparency were translated into the Constitution's provisions for open proceedings and for greater public access to Union documents.[531] The significance of the constitutional section on "The Democratic Life of the Union" lies in the actual rights created, but also in the ambitious language and tenor of the democracy articles as drafted. Because of the dramatic scope of these provisions, they will have an impact on any future debate over the EU's form. Under the Constitution, democracy at the EU institutional level is guaranteed to all EU citizens. This is certainly a step away from classic intergovernmentalism, and it may have constituted a further step toward classic federalism.

3.2 **The importance of democracy at the national level**

In Article I-46 of the Constitution, the same provision that references citizens' direct representation at the Union level, provides a reminder that the Member States themselves are represented on the European Council and Council, whose respective members are "democratically accountable either to their national parliaments, or to their citizens."[532] In Article I-47(4), which provides for the new right of citizen initiative within the EU, the requirement for submission of an initiative is the signatures of at least one million citizens. Interestingly, however, the article also requires that the requisite number of citizens must represent "a significant number of Member States." The EU's mandate in Article I-51 to protect individuals' personal data is also made

[529] Id. at 23.
[530] Id. at 24-26.
[531] Kokott and Ruth have commented on "increasing democratic legitimacy and transparency of the Institutions" as follows: "The Constitution, in principle, maintains the present institutional design, which, in spite of its well-known deficiencies with regard to the separation of powers and democratic legitimacy, seems to be the most appropriate at the Union's current state of integration. Attempting a major overhaul of the institutional set-up would have not only been premature and therefore unlikely to lead to satisfying results, but would have endangered the whole project of a Constitution. It thus appears, for the time being, preferable, to bring about the necessary changes not by a single 'constitutional stroke', but through the European integration process of progressive reforms and adjustments of the Union's institutional architecture, all the while striving for the utmost transparency." Kokott & Ruth, supra note 116, at 1331. See their expanded analysis, id. at 1331-33.
[532] Constitution art. I-46(2).

applicable to the Member States "when carrying out activities which fall within the scope of Union law."[533] There is no general requirement imposed on the Member States in all circumstances of their activities – only in their EU activities. Last, the statement in Constitution Article I-52(1) that the Union "respects and does not prejudice" the status of churches and non-confessional organisations is specifically tied to their status under the national laws of the Member States.

In contrast to the Constitution, the Treaties primarily mention the EU and its institutions in those few treaty provisions that suggest democratic principles and processes. The Member States and their democracy are surely implied in the Treaties, but the only specific reference to them is TEU Article 6, which notes that liberty, democracy and other principles are "common to the Member States."

4. DEMOCRACY AND THE DIVIDING LINES

Regarding the Constitution's unprecedented series of articles on the "democratic life of the Union,"[534] it is important to note that these provisions are mainly about the EU and not about the Member States. The few references to the Member States, identified above, must be seen as little more than reminders of Member State democracy in the context of the EU system. The Constitution's principal thrust in Articles I-45 to I-52 is to illustrate how the *Union* is to be brought closer to its citizens.

As noted in the preceding analysis, an increased association of the EU and its institutions with the familiar democratic principles and processes that EU citizens expect at the national level is a calculated move to create greater popular appreciation for the Union. Coincidentally, at a different level such developments may appeal to those who would desire the EU to evolve into an democratic federal system. In contrast, those who prefer to preserve the Union's essential character as an intergovernmental organisation might well argue that the EU does not need to offer either its own citizenship or Union-level democratic concepts; national citizenship and the national democracy should be sufficient. The reality is that the trappings of democracy do not necessarily create or portend a superstate. The EU can indeed offer more direct rights to its citizens – and thus foster greater popular support for the Union – without necessarily altering its essential character as a blended entity that is neither intergovernmental in the traditional sense, nor fully federal.

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[533] Constitution art. I-51(2).
[534] Constitution arts. I-45 to I-52.

With respect to the EU's existing dividing lines, greater transparency and more opportunities for citizen involvement do not obviously change anything. In the long run, greater citizen appreciation for the Union may open the door to expanded Union involvement in any number of substantive areas, and with that the dividing lines may well shift. But more trappings of Euro-democracy, by themselves, do not have that effect.

Chapter 10

A Flexible Entity

The history of the European Union is one of steady enlargement. It has grown from the original six nations that formed the European Coal and Steel and Community to the group of 27 resulting after the accession of Bulgaria and Romania on January 1st, 2007.[535] This growth stands in stark contrast to the general geographical stability of the individual Member States during the same 50-year period.[536] The EU's expansion has necessitated treaty provisions to reflect and govern the process, and the Constitution deals with both the accession of further Member States and the prospect that one or more states may choose to leave the Union. In addition, the Constitution provides for an additional form of structural flexibility in its provisions regarding the suspension of rights of a Member State that fails to live up to the Union's most basic principles.

1. FUTURE EXPANSION THROUGH ACCESSIONS

Article I-58(1) of the Constitution provides that the EU is to be open "to all European States" committed to promotion of the Union's values.[537]

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[535] The original six members were France, Germany, Italy, Belgium, the Netherlands and Luxembourg. Denmark, Ireland and the United Kingdom acceded in 1973, followed by Greece in 1981, Spain and Portugal in 1986, and Austria, Sweden and Finland in 1995. The 2004 "Big Bang" expansion took in Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Hungary, Slovenia, Cyprus and Malta.

[536] The principal geographical change among the Member States was the 1989 reunification of German, when the former East Germany merged into West Germany. A related development of political, but not geographical, significance was the attainment of true independence by Slovenia, Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Hungary, Bulgaria and Romania.

[537] For an analysis of the interplay between expansion of the EU through accessions and the development of the Union as a constitutional system, see Neil Walker,

The provision offers a procedure by which a state can apply for membership, and then the application must receive consent of the European Parliament and unanimous approval by the Council. After an accession agreement has been concluded, each of the existing EU Member States must ratify the agreement according to its national constitutional requirements.[538] The enlargement of the EU by admitting states that accept its basic principles is a concept previously expressed in TEU Article 49. The accession process described in Article 49 is essentially the same as the Constitution's formulation. In addition, the EC Treaty and TEU contain a Protocol on the Enlargement of the European Union.[539]

The Union's further enlargement has recently proven to be a sensitive issue, as reflected in the "no" votes in the French and Dutch referenda in mid-2005 on ratification of the Constitution.[540] Whereas at one point it was generally assumed that the EU would eventually admit Turkey and others, the 2004 and 2007 accessions have caused something of an identity crisis within the Union as well as an administrative challenge.[541] Nevertheless, the provision for a formal accession process in the Constitution and in the Treaties is based on the reality of the European Union as an entity whose geographical potential has not yet been reached.

2. CONTRACTION – WITHDRAWAL OF A MEMBER STATE

Part I of the Constitution presents an overview of the European Union, a kind of promotional and user-friendly summary of its values and objectives, its competences and the commitment of the Member States to its

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Constitutionalising Enlargement, Enlarging Constitutionalism¸ 9 Eur. L.J. 365 (2003). For a discussion of the linkage between accession to the EU and a candidate country's respect for human rights, see Cesare Pinelli, Conditionality and Enlargement in Light of EU Constitutional Developments, 10 Eur. L.J. 354 (2004).

[538] Constitution art. I-58(2).

[539] Protocol on Enlargement, supra note 376.

[540] The French referendum took place on May 29, 2005, followed closely by the Dutch vote on June 1st.

[541] Turkey has been approved as a candidate without a fixed accession timetable, but its possible accession has proven highly controversial, owing to a great extent to its overwhelmingly Muslim population. All future accessions may be in jeopardy, because the French and Dutch referenda have been seen in part as a reaction to the impact of the EU's expansion in 2004. Graham Bowley, EU teeters on edge of a broader crisis, Int'l Herald Trib., June 3, 2005; Katrin Bennhold, EU cuts expansion from its to-do list, Int'l Herald Trib., June 14, 2005. Other states considered as prospects for future accession include Norway, Iceland, Switzerland, Albania, Moldova, Ukraine and the Balkan states that were formerly part of Yugoslavia.

success. Ironically, after all of that, the final provision of Part I creates the right of a Member State to voluntarily withdraw from the Union. Article I-60 calls for notification by the withdrawing state, negotiation of a withdrawal agreement, and, unless the parties agree otherwise, an exit date two years after first notification is given to the EU. [542] A state that has withdrawn may later apply to rejoin the Union pursuant to the ordinary accession procedure.[543] The inclusion of a withdrawal right in the Constitution, which has no precedent in the Treaties, was highly controversial at the Convention.[544] A number of proposals were made to delete the provision, and, failing that, to create more severe consequences for the withdrawing state. In the end, the prevailing sentiment was expressed by Convention President Valery Giscard d'Estaing, who noted that the European Union "is after all not a prison." [545] Thus, Article I-60's provisions require procedures to be followed, but they impose no penalties.

George Bermann has described the EU's constitution-making as "highly untidy," and he notes that "the product at any given time will look highly unfinished."[546] He adds:

> This is all the more so when the only thing that has been predetermined is that these states will in principle continue to deliberate among themselves (and with other partner states they might pick up along the way), when each amendment will have to have been the product of the untidy political bargaining that strongly typifies intergovernmental decision-making, and when, by way of innovation under the new draft constitution, all States know that their partners have the express right to withdraw if they should ever become

[542] Constitution arts. I-60(2), I-60(3). For a discussion of withdrawal from the Union, see Peter-Christian Müller-Graff, The Process and Impact of EU Constitution-making: 'Voice and Exit,' in The EU Constitution: The Best Way Forward? (Deirdre Curtin, Alfred E. Kellermann & Steven Blockmans, eds., 2005).

[543] Constitution art. I-60(4). See also Constitution art. I-58 (regarding accession procedures).

[544] Despite the controversy over Article I-60, the European Union has experienced a type of withdrawal, not of a Member State, but of a constituent portion of a Member State. In 1985 Greenland, a part of the Kingdom of Denmark, was permitted to withdraw from the European Community and change its status to that of an Overseas Country or Territory. For an analysis of this event and a comparative review of withdrawal rights and restrictions in several different governmental systems, see Raymond J. Friel, Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution, 53 Int'l & Comp. L.Q. 407 (2004).

[545] Norman, supra note 152, at 215, 255.

[546] Bermann, supra note 47, at 369.

> sufficiently disenchanted or come to look upon the EU as a sufficiently bad bargain.[547]

Secession of a constituent part from a federation, as the American Civil War demonstrated, is a threat to the very existence of the federal entity and is considered by some scholars to be illegal.[548] Furthermore, treaties are governed by the rule of *pacta sunt servanda* – the expectation that a treaty is a solemn undertaking and that a state will fulfill its treaty obligations.[549] However, even that venerable precept has its exceptions. International law does recognise a variety of grounds for revoking and withdrawing from a treaty.[550] Under the law of treaties the concept of state sovereignty would allow withdrawal either in accordance with the terms of the treaty itself or on the basis of an ultimate expression of self-interest. If the treaty itself does not provide for withdrawal, a party may withdraw on grounds such as supervening impossibility of performance or a fundamental change of circumstances.[551] The Constitution's inclusion of Article I-60 underscores the fact that in many ways it is still a treaty – its parties, the Member States, may assert their self-interest by withdrawing from the Union.[552] It can be argued that Article I-60 pays homage to the deepest level of Member State sovereignty.

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[547] Id.

[548] The United States Supreme Court has decreed secession to be in violation of American federal law. Texas v. White, 74 U.S. 700, 724-26 (1869). Joseph H.H. Weiler has noted the "juridical" conclusion that under the current Treaties unilateral withdrawal from European Union would be illegal. Weiler, supra note 29, at 18. Cass Sunstein argues that provisions permitting secession may well endanger "ordinary democratic processes" and that they have no place in a constitution. Cass Sunstein, Constitutionalism and Secession, 58 U. Chi. L. Rev. 633, 669-70 (1991).

[549] Preamble, Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 336, art. 60 [hereinafter Vienna Convention]; Ian Sinclair, The Vienna Convention of Treaties 84 (1984).

[550] Vienna Convention, supra note 549, arts. 54-64. See also, Sinclair, supra note 549, at 181.

[551] Vienna Convention, supra note 549, arts. 61, 62.

[552] Raymond Friel sees secession as a distinctly anti-federal concept, and he writes: "The degree to which secession is controlled tells us much about whether the Union is simply an association of States or a true federal Union." Raymond J. Friel, The Draft Constitution: Issues and Analyses: Secession from the European Union: Checking out of the Proverbial "Cockroach Motel," 27 U. Fordham Int'l L.J. 590, 641 (2004). Michael Dougan describes Article I-60 as "the ultimate constraint upon Union competence." Dougan, supra note 358, at 8.

3. SUSPENSION OF RIGHTS

Article I-59(2) of the Constitution provides that the European Council may, after complying with strict procedures, determine that a Member State has committed a "serious and persistent breach" of the EU's core values. The values are those expressed in Constitution Article I-2, namely, "respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." The Article I-59 procedures include a preliminary determination by the Council and the consent of the European Parliament.[553] The decision by the European Council must be unanimous, with the accused Member State ineligible to vote on the matter.[554] Upon such a determination, the Council may suspend certain of the violating State's rights under the Constitution, including its voting rights within the Council.[555] Despite such a suspension, Article I-59(3) requires that the State in question will "continue to be bound by its obligations under the Constitution."

Similar provisions for the suspension of rights are contained in the Treaties. Article 7 of the TEU offers the greatest detail as to the procedures leading to a suspension, and the principles that the offending Member State must have violated are set forth in Article 6(1) of the TEU. These principles are "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law" – the Constitution's references to human dignity, equality and the rights of minorities are not mentioned in the treaty. EC Treaty Article 309(1) refers to and builds upon the TEU principles and the TEU suspension process, and it adds that a Member State whose voting rights have been suspended under the TEU will also lose its voting rights under the EC Treaty. Other rights under the EC Treaty may also be suspended, as the Council may determine.[556]

There is a slight difference between the Constitution and the TEU with respect to who will make the critical decision on suspension. Where the Constitution's process involves action by the European Council,[557] Article 7(2) of the TEU refers to the "Council, meeting in the composition of the Heads of State or Government."[558] The distinction is that the European Council of the Constitution includes the European Council President (who

[553] Constitution arts. I-59(1), I-59(2).
[554] Constitution arts. I-59(2), I-59(5).
[555] Constitution art. I-59(3).
[556] EC Treaty art. 309(2).
[557] Constitution art. I-59(2).
[558] TEU art. 7(2).

does not represent any Member State) and the President of the Commission, each sitting as a nonvoting member. The "Council" formation described in the TEU would not include the Commission President, but the "Council" President would obviously be present as one of the heads of state or government, and he or she would be a voting member of the formation.[559] One other difference is that the Constitution's voting requirements for certain Council decisions under Article I-59 are expressed in percentages,[560] while TEU Article 7(5) provides for the use of allocated votes as set forth in EC Treaty Article 205(2).[561] Regardless of these technical differences, under the Treaties and the Constitution the suspension of rights is essentially a political process assigned to the highest political levels within the Union.

Given the harshness of an actual suspension of rights, it would seem unlikely that the procedure will ever be utilised.[562] However, if it ever is invoked, the citizens of the suspended state would be partially disenfrachised by having their national government incapable of fully representing them at the EU.[563] Thus, both the Constitution and the Treaties direct the Council to "take into account the possible consequences of such a suspension for the rights and obligations of natural and legal persons."[564] The specific details on such "taking into account" are not provided.

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[559] Note that the European Council is described in the second paragraph of TEU Article 4, and this institution does include the President of the Commission. However, the suspension procedure of TEU Article 7 does not involve the European Council as defined in Article 4. As noted in the text, the suspension decision is to be made by the "Council, meeting in the composition of the Heads of State or Government." TEU art. 7(2).

[560] Constitution Article I-59(5) defines a qualified majority vote of the Council in certain Article 59 decisions to be "72% of the members of the Council, representing the participating Member States, comprising at least 65% of the population of these States."

[561] See also EC Treaty art. 309(4).

[562] In January of 2000 the EU Member States imposed an informal "diplomatic isolation" on Austria after a far right political leader, Jörg Haider, joined the country's governing coalition. This situation, which did not constitute official EU action, lasted approximately 9 months before being withdrawn. However, the episode led directly to the later inclusion of TEU Article 7 in the Treaty of Nice. See EurActiv.com, Austria's Haider affair gave the EU an "emergency brake," 7 August, 2006, http://www.euractiv.com/en/agenda2004/austria-haider-affair-gave-eu-emergency-brake/article-151443.

[563] Anticipating such fallout, the Constitution provides that "the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons." Constitution art. I-59(3).

[564] The quote is from Constitution art. I-59(3). The language of TEU art. 7(3) and EC Treaty art. 309(2) is nearly identical.

In legal terms the employment of Article I-59 represents a form of counter-measure imposed by treaty partners on a state that has breached its treaty obligations. The aggrieved states reciprocate by denying the violating state the benefit of the treaty relationship.[565] The underpinnings of countermeasures are twofold: the sovereignty of the violating state and the corresponding inability of the other states to enforce treaty compliance. From this point of view, Article I-59 and its TEU antecedent tacitly recognise that the Member States are sovereign entities within the Union, and in their sovereignty they may be immune to centrally imposed enforcement of their core responsibilities. In contrast, in a strong federal system the ability of the central government to enforce the constitution should not be in doubt.

4. VARYING LEVELS OF COMMITMENT

4.1 **Enhanced cooperation**

Article I-44 of the Constitution, supplemented by Constitution Articles III-416 to III-423, permits groups of Member States to engage in "enhanced cooperation" in areas where the Council has determined that the Union as a whole cannot be expected to participate. There are demanding criteria to be met before a plan of enhanced cooperation may be undertaken. This special form of cooperation may be undertaken only in areas outside the EU's exclusive competence, and only if Union-wide action is not feasible. The cooperative activity may not undermine the internal market, cause any discrimination in trade within the EU, distort competition or interfere with the rights of non-participating Member States. Further restrictions include a requirement that one-third of the Member States must participate, that any other Member State may join the cooperation at any subsequent time and that the activity must "further the objectives of the Union, protect its interests and reinforce its integration process."[566] Once the process has been approved the participating states may make use of the EU institutions to implement the programme.[567]

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[565] Vienna Convention, supra note 549, art. 60. Notwithstanding the possibility of suspension of a Member State's voting rights, Joseph H.H. Weiler has argued that legal remedies available within the EU have largely eliminated "the most central legal artifact of international law: the notion (and doctrinal apparatus) of exclusive state responsibility and its concomitant principles of reciprocity and counter-measures." Weiler, supra note 29, at 29.

[566] Constitution art. I-44. See also Constitution arts. III-416, III-417.

[567] Constitution art. I-44(1).

The Constitution follows the precedent of the Treaties with respect to enhanced cooperation. The procedure is provided for in Articles 11 and 11a of the EC Treaty with respect to the First Pillar, in TEU Articles 27a through 27e for the Second Pillar, and TEU Articles 40 through 40b for the Third Pillar. Procedural details for all types of enhanced cooperation are provided in Articles 43 to 45 of the TEU. Both the TEU and Constitution refer to the enhanced cooperation as a "last resort,"[568] and in similar terms they prohibit the process from undermining the internal market or causing trade discrimination against non-participating Member States. Notable changes from the Treaties include the Constitution's requirement that one-third of Member States must participate, rather than a fixed number of eight states,[569] and the ability of a Member State to block enhanced cooperation in the area of Common Foreign and Security Policy on grounds of national policy[570] has been eliminated.[571] It should be noted that under the Treaties enhanced cooperation as a formal process has not yet been utilised.[572]

4.2 **Other forms of special cooperation**

It might well be noted that the EU is already a multi-track system with regard to monetary policy. Since Slovenia became a full participant in the common currency at the beginning of 2007, there are 13 Member States within the euro-zone, 11 new Member States which must enter the zone when economically qualified, two states (the U.K and Denmark) which are permitted to remain outside the common currency, and one state (Sweden) which would qualify but has chosen not to take the necessary steps do so.[573] The euro programme is a unique, treaty-based activity that contemplates non-participation by certain Member States; it is not being carried out under the existing enhanced cooperation provisions in the Treaties.[574] The Constitution would have carried forward the current program, including the opt-outs.

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[568] TEU art. 43a; Constitution art. I-44(2).
[569] Constitution art. I-44(2); TEU art. 43(g).
[570] TEU arts. 27(c), 23(2).
[571] For further analysis of the Constitution's changes to the enhanced cooperation procedures, see Dougan, supra note 358, at 12-13.
[572] Id. at 12.
[573] The current euro-zone countries are Finland, Ireland, the Netherlands, Belgium, Luxembourg, France, Germany, Spain, Portugal, Austria, Italy, Greece and Slovenia. The new Member States required to join are Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary, Cyprus, Malta, Bugaria and Romania. Among this group Cyprus and Malta have been approved to join the euro-zone in 2008. Sweden has not yet created the necessary institutional independence for its central bank.
[574] For further discussion of economic and monetary policy, see part 1.2 of Chapter 17.

Another treaty-based example of "flexible integration" relates to the EU's integration into the EU legal order of the Schengen *acquis* on elimination of internal border controls, coordinated external border controls, certain visas, asylum and other related matters. When the European Community was unable to arrive at a mutually acceptable agreement on these issues, a core group consisting of France, Germany, Belgium, Luxembourg and the Netherlands entered into a 1985 agreement outside the Community process. The accord eventually included 13 countries, and it was thereafter incorporated into EU law in 1999 through the Treaty of Amsterdam, which also transferred certain Third Pillar matters to the First Pillar.[575] However, through protocols the treaty recognised special treatment for Denmark, Ireland and the United Kingdom.[576] Pieter Jan Kuijper has summarised these arrangements as follows:

> The sector of freedom of movement, asylum and immigration as well as of civil cooperation has become famous for its variable geometry. To recapitulate briefly: the UK and Ireland are in principle excluded from integration in those areas, but may opt into Community law, if they so desire, whilst Denmark is wholly excluded, except for visa policy and can only opt for the possibility to apply acts building on the Schengen acquis as a matter of normal international law (i.e. no supremacy and no direct effect).[577]

The Constitution would have perpetuated these exceptional rights and the protocols.[578]

An additional concept similar to enhanced cooperation, but also technically outside the enhanced cooperation procedures, is the requirement in

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[575] Europa Website, The Schengen acquis and its integration into the Union, http://europa.eu.int/scadplus/leg/en/lvb/l33020.htm. See Protocol integrating the Schengen *acquis* into the framework of the European Union, Nov. 10, 1997, O.J. (C 340) 144. Also see Pieter Jan Kuijper, The Evolution of the Third Pillar from Maastricht to the European Constitution: Institutional Aspects, 41 C.M.L.R. 609 (2004).

[576] Protocol on the position of the United Kingdom and Ireland, Nov. 10, 1997, O.J. (C 340) 99; Protocol on the position of Denmark, Nov. 10, 1997, O.J. (C 340) 101.

[577] Pieter Jan Kuijper, supra note 575, at 620 (2004). For further critical commentary by Kuijper on the confusing results of flexible application of the Schengen regime, see id. at 624-26.

[578] Protocol on the position of the United Kingdom and Ireland on policies in respect of border controls, asylum and immigration, judicial cooperation in civil matters and on police cooperation, Dec. 16, 2004, O.J. (C 310) 353; Protocol on the position of Denmark, Dec. 16, 2004, O.J. (C 310) 356.

Constitution Article I-41(6) that certain Member States with superior military capabilities must engage in "structured cooperation" in connection with the EU's common security and defence policy.[579] According to Article III-312 of the Constitution, provisions relating to enhanced cooperation are applicable to such structured cooperation, including the right of a Member State initially outside the programme to subscribe at a later date. Article 17 of the TEU anticipates cooperation between Member States in the field of armaments[580] and bilateral cooperation between states "in the framework of the Western European Union (WEU) and NATO,"[581] but these programs and organisations exist outside the European Union. The WEU may serve as a model of structured cooperation, but the innovation in the Constitution is that this form of cooperation is to be carried out "within the Union framework."[582]

One further example of the EU's tolerance for special relationships among its Member States is the explicit permission in Constitution Article IV-441 for continued "regional unions" among the Benelux countries. The Constitution's provision is essentially identical to Article 306 of the EC Treaty.

4.3 The implications of varying commitments

The multi-track characteristic of the European Union has been the subject of much analysis, undoubtedly because it creates confusion and it may be seen as an inherent weakness in the system. In 2004 the think-tank Friends of Europe expressed their own concerns on this subject, tempered with a sense of realism:

> Multi-speed solutions clearly generate anxiety. They raise difficulties of principle. Yet they are already part and parcel of EU reality. This is most notably the case with Schengen and the Eurozone. A defence group is beginning to form along similar lines. The Benelux customs union and the Belgo-Luxembourg currency union played the same role in the early days. Social opt-outs are also part of the practice. And the new member states will have only limited access to some important policies, including agricultural support, structural funds and the single market in labour.

[579] For further requirements, see Constitution art III-312.
[580] TEU art. 17(1).
[581] TEU art. 17(4).
[582] Constitution art. I-41(6).

> So the question is not whether or not to introduce multi-speed now. The real issue is whether the concept can be taken further in ways that are helpful to the Union as a whole.[583]

The Friends of Europe then identified three classes of varying commitment that might be considered:

> --A full-scale *Political Union*, of perhaps the six founder states, binding themselves to act as one on all issues, taking the form of a federation or confederation, and effectively becoming a single state. Discussed some years ago, this hardly seems a real prospect today.
>
> --A clearly defined *Vanguard*, or hard core, of states agreeing to work together on a single list of specified issues. This has been frequently advocated in recent years.
>
> --A number of *Pioneer Groups* with different membership for different issues, but with a common core of France, Germany and some others.[584]

The opportunities for varying levels of commitment by the EU's Member States are uncharacteristic of a true federal system in which powers are divided vertically between the central government on the one hand and the states on the other.[585] In a federation, critical matters of policy are determined centrally and are applicable throughout the system. If there is insufficient support for a policy at the federal level, either no action will be taken or, at best, separate action might be taken at the state level, but groups of states will not undertake to do as a bloc what the central government could not accomplish. Action by smaller groupings reveals a lack of collective will to maintain policy consistency within the EU.[586] It is indisputable that if enhanced cooperation or other forms of group activity are utilised to a

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[583] Keith Richardson & Robert Cox, Salvaging the Wreckage of Europe's Constitution, 2004 Friends of Eur. 3, 17.

[584] Id. at 18.

[585] Robert Senelle, Federal Belgium, in Federalism and Regionalism in Europe 27, 29 (Antonio d'Atena ed., 1998).

[586] For a detailed review of "flexible integration" within the EU, both as to historical experiences and future possibilities, see Franklin Dehousse, Wouter Coussens & Giovanni Grevi, Integrating Europe: Multiple speeds – One direction? (EPC, Working Paper No. 9, 2004), available at http://www.theepc.net/en/default.asp?TYP=CE&LV=177&see=y&PG=TEWN/EN/detail&AI=353&l=. For an integrationist's perspective on the value of enhanced cooperation, see Fischer, supra note 65, at 9-12.

significant extent, the result will be a loss of coordination and an overall weakening of the EU. A multi-track Union would emphasise the continuing autonomy of the states and the intergovernmental character of the Union. The Constitution's enshrinement of enhanced cooperation and similar vehicles, while perhaps a political necessity, reflects the continuing vitality and integrity of the Member States as separate nations.

5. FLEXIBILITY AND THE DIVIDING LINES

Most of the concepts discussed in this chapter – accessions, suspension of rights and enhanced cooperation – describe a Union that is either creatively adjustable or frustratingly unstable, depending on one's enthusiasm for structural flexibility. But these concepts are not changed in the Constitution, and thus the relevant dividing lines are not affected. The remaining concept – the withdrawal of a Member State – is articulated for the first time in the Constitution, and one could argue that a state's control over its EU membership (a particular dividing line) would shift dramatically toward the individual state. However, our analysis strongly suggests that the right of withdrawal in all likelihood already exists under the Treaties, either as a legal proposition or as a political reality. Thus, the Union as a flexible entity and its related dividing lines would not have changed under the Constitution.

Chapter 11

Amending the Constitutional Treaty – the Unanimity Requirement

Every national legal system has a procedure for amending its constitution or other foundational legal acts. Every democratic system provides for such amendment to be carried out on the basis of majoritarian principles. On the other hand, international law provides that amending a treaty requires the approval by each nation that is a party to the instrument.[587] One of the striking characteristics of the European Union is its foundational basis as a treaty organisation, clearly manifested in the Treaties' provisions requiring unanimity for their amendment. The Constitution would have perpetuated this characteristic, while adding flexibility to the process of amendment.[588]

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[587] Vienna Convention, supra note 549, art. 40. Article 40 provides that unanimity is required unless the treaty itself provides otherwise.

[588] A frequently cited characteristic of the European Union is that, beginning with the Single European Act in 1985, the Treaties have been the subject of amendment every few years. In response to this phenomenon, various commentators have called for greater stability. One such critique was offered by Neil Walker, who suggested that the EU might benefit from a strict time limit of 10 years between amendments to the new Constitution, if it is ratified. To counter concerns about the rigidity of such a limitation, Walker asserts: "To design a constitution in the knowledge that it must remain untouched for 10 years would concentrate the minds of present IGC and future Convention members not only on the profound consequences of the results of their deliberations, but also on the question of what matters should be excluded from the 10-year embargo." Neil Walker, Europe's Constitutional Passion Play, 28 Eur. L. Rev. 905, 908 (2003).

1. THE STANDARD AMENDMENT PROCEDURE

The "ordinary revision procedure" for amending the Constitution is set forth in Article III-443. Any Member State government, the European Parliament or the Commission may submit an amendment proposal to theCouncil, which refers it to the European Council and notifies the national parliaments.[589] After consulting with the European Parliament and the Commission, the European Council by simple majority vote must either convene a constitutional convention or an intergovernmental conference to consider the proposed amendment.[590] Much like the Convention that wrote the Constitution, an amending convention would consist of representatives of the Member State parliaments, heads of state or government of the Member States, the European Parliament and the Commission.[591] If an IGC is convened instead of a convention, the conference will simply consist of representatives of each of the Member States.[592] A convention must approve the amendment by "consensus," whereupon it is referred to an IGC.[593] Whether acting alone without a convention or acting upon reference from a convention, the IGC must approve a proposed amendment by "common accord."[594] After IGC approval and Member State representatives' signing of the amendment document, the amendment will take effect only when it has been ratified by all of the Member States, acting in accordance with their own constitutional requirements.[595] If four fifths of the Member States have ratified the amendment within two years of its signature, but full ratification has not been achieved, the Constitution provides that "the matter shall be referred to the European Council."[596]

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[589] Constitution art. IV-443(1).
[590] Constitution art. IV-443(2).
[591] Constitution art. IV-443(2).
[592] Constitution art. IV-443(2), (3).
[593] Constitution art. IV-443(2). The editors of the Common Market Law Review have criticised the process of holding a convention and then an IGC. They are concerned that the 2002-2003 Convention was not sufficiently representative of the Member States and that it exceed its Laeken Declaration mandate. One particular criticism related to the Convention's controversial (and ultimately unacceptable) new formula for QMV on the Council. The editors assert that "it is inconceivable that a Presidency would have put before an IGC, in which all the protagonists were represented and speaking with equal voices, a proposal so loaded with political dynamite." Editorial, The Failure to Reach Agreement on the EU Constitution - Hard Questions, 41 C.M.L.R. 1, 3 (2004).
[594] Constitution art. IV-443(3).
[595] Constitution art. IV-443(3). See comments on ratification in part 4 of this chapter.
[596] Constitution art. IV-443(4).

The Treaties' only amendment provisions are found in Article 48 of the TEU, which refers to "the Treaties on which the Union is founded." Article 1 of the TEU explains that the EU "shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty." Thus, the EC Treaty is included in the TEU's amendment provision. One provision of the EC Treaty, Article 300(5), confirms this by providing that if an international agreement to be entered into by the Community would require an amendment to the EC Treaty, such amendment must be adopted pursuant to TEU Article 48. Procedurally, under Article 48 any Member State government or the Commission may submit an amendment proposal to the Council. The Council must "consult" with the European Parliament, and may consult with the Commission, and thereafter the Council may deliver "an opinion in favour" of calling an intergovernmental conference into existence. The IGC is then convened by the Council President, and the conference's decision to approve the proposed amendment must be by common accord. If approved, the amendment must be ratified by all Member States in accordance with their respective national constitutional requirements, and the amendment will take effect when all of the states have ratified. Article 48 does not provide for a constitutional convention as a preliminary step to the IGC process, but the 2002-2003 Convention took place in any event.

Herwig C.H. Hofmann has commented that the ratification requirement relating to constitutional amendments "can be regarded as the last direct link between EU law and public international law principles … A strong intergovernmental aspect accompanies it."[597] As noted in Chapter 1, the intergovernmental school of thought places emphasis on traditional treaty law, under which the dividing lines are clear and the ultimate power is reserved to the Member States.

2. THE NEW SIMPLIFIED AMENDMENT PROCEDURES

The Constitution also contains two "simplified" amendment procedures relating to Part III of the document. Under the first, Article IV-444 provides a mechanism for changing unanimous voting requirements in Part III to QMV, and special legislative procedures in Part III can be replaced with

[597] Herwig C. H. Hofmann, A Critical Analysis of the New Typology of Acts in the Draft Treaty Establishing a Constitution for Europe (Eur. Integration Online Papers, Working Paper No. 9, 2003), available at http://eiop.or.at/ eiop/pdf/2003-009.pdf. As noted earlier, the intergovernmental school of thought places emphasis on the ultimate power of the Member States.

the ordinary procedure.[598] Each of these changes can be adopted by the European Council without the necessity of a convention or IGC. However, prior to voting the European Council must notify the Member State parliaments of its possible action. Opposition by any parliament within six months of notification from the European Council will block the amendment, and the European Council may not proceed. If no opposition is expressed, the European Council may adopt the amendment unanimously as a European decision.[599]

The second procedure, presented in Article IV-445 of the Constitution, permits revisions to Title III of Part III (the internal policies of the Union) without a convention or IGC, but a unanimous decision of the European Council is required, and the amendment is subject to ratification by all of the Member States.

Interestingly, there are several additional procedures that effectively amend the Constitution while completely avoiding referral to national parliaments or ratification by the Member States:

> --Constitution Articles I-40(7) and III-300(3) permit additional QMV decision-making to be instituted in the common foreign and security policy. This change requires a unanimous decision of the European Council.
>
> --Constitution Article I-55(4) permits additional QMV in relation to the EU's multiannual financial framework. This change requires a unanimous decision of the European Council.
>
> --Constitution Article III-269(3) permits additional QMV in certain matters of family law with cross-border implications. A unanimous decision of the Council is necessary to make this change.
>
> --Constitution Article III-422(1) permits additional QMV decision-making (participating Member States only) within a program of enhanced cooperation. This change requires a unanimous decision of Council members representing the participating Member States only.
>
> --Constitution Article III-422(2) permits a special legislative procedure within a program of enhanced cooperation to be changed to

[598] Constitution art. IV-444(1), (2).
[599] Constitution art. IV-444(3). European Council decisions are to be adopted by consensus unless the Constitution provides otherwise. Constitution art. I-21(4).

> the ordinary legislative procedure. This change requires a unanimous decision of Council members representing the participating states only.[600]

The national parliaments and Member State governments have no role in any of the foregoing processes, but Member States are protected by the requirement of a unanimous Council or European Council decision to institute these changes.

Neither the TEU nor the EC Treaty contains the simplified amendment procedures of Articles IV-444 or IV-445 of the Constitution, and neither treaty provides any of the Constitution's other abbreviated procedures that avoid referral to national governments. Article 42 of the TEU does include a procedure by which the Council (by unanimous vote) may move actions from the treaty's Third Pillar to Title IV of the EC Treaty, but the Council's decision must be approved by each of the Member State governments. This Article 42 procedure would have the same effect as a treaty amendment, and national approval is required, but an intergovernmental conference under TEU Article 48 may be avoided. It is a streamlined process, but not as easily carried out as the Part I and Part III abbreviated procedures under the Constitution.[601]

Peter Norman has reported that the Convention referred to the Constitution's simplified amendment articles as "bridge or *passerelle*" provisions "designed to eliminate the need for future treaty changes (with the attendant problems of ratification by all member states)."[602] Various versions of the provisions were hotly debated at the Convention,[603] but Norman sees

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[600] The provision that restricts voting under Articles III-422(1) and (2) to participating Member States is found in Part I of the Constitution. Constitution art. I-44(3). However, non-participating members may take part in the Council's deliberations. Id.

[601] Note that the Finnish Presidency in the second half of 2006 stated its intention to actively pursue the "community method" and greater use of qualified majority voting in Third Pillar matters, which would likely be brought about through the TEU Article 42 procedure. See the published speech of Prime Minister Matti Vanhanen at the plenary session of the European Parliament on 5 July 2006, available at http://www.government.fi/ajankohtaista/puheet/puhe/en.jsp?oid=163080. These ideas had been introduced on May 10, 2006 by Commission President José Manuel Barroso, "A Citizen's Agenda – Delivering results for Europe, Speech/06/286, available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/286&format=HTML&aged=0&language=EN&guiLanguage=en.

[602] Norman, supra note 152, at 113.

[603] Id. at 286-97.

the end result as something that "may offer an interesting way forward."[604] In particular, he believes that Article IV-444, "marks a major relaxation" of the existing requirement of an IGC and Member State ratification. He is optimistic that the procedure may be workable, even though it has been "criticised by integrationists as likely to remain inoperable in a Union of 25."[605] It is easy to agree with Norman that the Constitution would have added variety and flexibility to the amendment process. Nevertheless, his optimism must be tempered by the fact that unanimity is preserved in all of the proposed new procedures, regardless of how or where the consensus must be achieved. As discussed in part 4 of this chapter, the retention of unanimity is of vital importance in assessing the impact of the new processes on the EU's dividing lines.

3. INITIAL RATIFICATION

Although the focus in this chapter is on the amendment process, it should be noted that the initial adoption of the Constitution also requires Member State ratification, a process that ultimately failed. Article IV-447 requires that its initial approval be accomplished through ratification by each of the states at the national level according to its own constitutional requirements,[606] and the Constitution would become effective only when all Member States have ratified.[607]

The Constitution's ratification process mirrors that of the Treaties. Article 313 of the EC Treaty calls for the "High Contracting Parties" to ratify the treaty "in accordance with their respective constitutional requirements." The effective date of the instrument was to be the date the final signature was deposited into the archives of the Italian government.[608] Article 52 of the TEU

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[604] Id. at 331.
[605] Id.
[606] Constitution art. IV-447(1).
[607] Constitution art. IV-447(2). However, note that Declaration 30 to the Constitution provides that if ratification is not completed within two years of the Constitution's signature, but four fifths of the Member States have ratified, then the matter will be referred to the European Council for further consideration. Declaration (30) on the ratification of the Treaty establishing a Constitution for Europe, supra note 22 at 464. In a general discussion of the character of the Constitution, including the question of whether it is actually a constitution or a treaty, Anneli Albi and Peter Van Elsuwege have commented that the Constitution's ratification requirement, which corresponds to treaty practice, "does not diminish its constitutional character." Albi & Van Elsuwege, supra note 116, at 750.
[608] EC Treaty art. 313, 314.

contains identical requirements for initial ratification of the treaty,[609] with the effective date being January 1, 1993 or the first day of the month following the date of deposit of the last signature, whichever should occur later.[610]

With regard to initial adoption, both the Constitution and the Treaties are consistent with the Vienna Convention on the Law of Treaties. Article 24 of the Convention provides that unless a treaty specifically provides otherwise, "a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States."[611]

4. UNANIMITY REQUIREMENTS AND THE DIVIDING LINES

The Constitution's unanimity requirements – both as to initial ratification and as to subsequent amendment – are a reflection that the Constitution would have retained the essential character of the existing Treaties as international compacts among sovereign nation states. The EC Treaty and TEU have been subject to unanimous approval at the time of original adoption and whenever an amendment is proposed. All contracting parties have been required to approve each word of the treaty text at each stage of the document's development, and this indeed reflects standard treaty practice. The fact that the Constitution would have been subject to some version of unanimous approval for initial ratification and for later amendment is one strong indicator that the Constitution is itself a treaty. Its official name, "Treaty Establishing a Constitution for Europe," is not coincidental.

The unanimity rules offer clear evidence of a dividing line between the Union and the Member States that would not have shifted under the Constitution. Of course, one could argue that because national ratification would be eliminated for some amendment procedures, the ultimate voice in the amendment process would be transferred from the national capitals to the Council chambers in Brussels. Wouldn't this procedural change reflect something of a political shift and a modest centralising trend? While it is inarguable that the new amendment processes would have been more efficient and more "centrally" carried out, one should not overlook the fact that the Council by its very nature consists of a group of ministers, each of whom is directly representative of and answerable to a national government and its sovereign interests. Except for the unlikely situation of a renegade minister, the national veto would always be available under the Constitution, and no

[609] TEU art. 52(1).
[610] TEU art. 52(2).
[611] Vienna Convention, supra note 549, art. 24(2).

Member State should view the new amendment processes as a transfer of power to Brussels.

But unanimity has its detractors. Giovanni Grevi has written: "Considering the sometimes twisted dynamics of national politics in relation to Europe, this is absurd and seriously undermines the effectiveness of a very important procedure, allowing for a minimal degree of flexibility to overcome unanimity."[612] Grevi's complaints are made in the context that at the Convention there were several attempts to permit constitutional amendments by less than a unanimous vote. However, even proposals for an easier path to amendment of Part III provisions that "do not involve a shift of competences of the Union and member states" were rejected, despite the suggestion that such non-threatening amendments be approved by a five-sixths majority of the Member States.[613]

With the unanimity requirement well preserved regardless of which amendment procedure is followed, each Member State would have effectively possessed a veto on even minor changes to the highly detailed Constitution. The need for flexibility could have been provided much more efficiently if a majority vote were sufficient, but the framers of the Constitution conceded the point. The majoritarian ideal yielded to the absolute right of each Member State to preserve intact what it has previously agreed to, including the Constitution's carefully drawn dividing lines. Any formal change in the competences of the Union and its institutions – even if minor – would have been subject to procedural safeguards and full consensus. In acceding to EU membership and in choosing to remain in the Union, each Member States could expect the maintenance of the status quo unless it specifically consented otherwise. The Member States need not have feared that their national powers would be eroded without their conscious and explicit approval. In the final analysis, the unanimity requirement protects each state from the unwanted imposition of an ultimate loss of sovereignty, which could occur if a majority or even super-majority of states were given the power to amend the Constitution or any of the Treaties. Such stability remains an integral part of the EU bargain.

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[612] Grevi, supra note 402, at 11. For an analysis of the historical development and future prospects for the treaty/constitutional amendment process, see Smith, supra note 29, at 207-53.

[613] See Norman, supra note 152, at 81, 293, 332.

Chapter 12

Principles Underlying EU Action

To complete this analysis of the basic character of the European Union, it is appropriate to examine several foundational principles that govern the EU's activities. These principles both reinforce and restrict Union power, and thus they reflect both the independence of the Union and its dependence on the Member States that created it. In the Constitution, most of these precepts are expressed in Part I, Articles I-11 to I-18, gathered under the heading "Union Competences."

1. CONFERRAL

The Constitution grants a wide range of power and authority to the European Union, the scope of which is discussed throughout this treatise. The powers granted to the Union under the Constitution are largely the same powers that have been assigned to the Union and the Communities under the Treaties.[614] Under the Constitution and the Treaties the EU's powers arise by conferral, which is in essence a principle of limitation.

The first provision of the Constitution, Article I-1(1), states that "this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common." The same provision notes: "The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise on a Community basis the competences they confer on it." Article I-11(1) declares:

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[614] Particular differences between the Treaties and Constitution are discussed throughout this treatise, with emphasis on how competences are allocated between the EU institutions on one hand and the governments of the Member States on the other. The inclusion of the Charter of Fundamental Rights of the Union is the most noteworthy change, but its actual impact on EU competences remains to be seen.

"The limits of Union competences are governed by the principle of conferral," while Article I-11(2) adds that pursuant to this principle, "the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution." These are the key statements regarding conferral, but several other references should be noted:

> --Article I-3(5) mentions the competences conferred on the Union "in the Constitution."
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> --Article I-6 simply refers to the Union "exercising competences conferred on it."
>
> --Subsections 1 and 2 of Article I-12 begin with the words: "When the Constitution confers on the Union…."
>
> --Article I-14(1) refers to the Union sharing competences with the Member States "where the Constitution confers on it [the EU] a competence…."
>
> --Article II-111(1) refers to "the limits of the powers of the Union as conferred on it in the other Parts of the Constitution."
>
> --Article III-115 states that the EU is to "ensure consistency" in its activities in light of its objectives and "in accordance with the principle of conferring of powers."
>
> --Article III-315(6), dealing with the EU's common commercial policy, references the "exercise of the competences conferred by this Article."
>
> --In Article IV-445, which establishes a simplified procedure for amending certain provisions in Title III of Part III of the Constitution, subsection 3 states that the European decision approving such an amendment "shall not increase the competences conferred on the Union in this Treaty."

The ramifications of these different formulations are discussed below, but regardless of how conferral is expressed in the Constitution, its implications

are not left to speculation. Article I-11(2) states: "Competences not conferred upon the Union in the Constitution remain with the Member States."[615]

The TEU does not mention the conferral principle. The EC Treaty contains a single, but significant reference to conferral of powers on the European Community. EC Treaty Article 5 states: "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein."[616] Thus, where the Treaties contain a single reference to powers being conferred on the Community *by the EC Treaty*, Articles I-1(1) and I-11(2) of the Constitution provide a new emphasis that conferral comes *from the Member States*.

As illustrated above, in two instances the Constitution describes conferral without mentioning its source (Articles I-6, III-115). It also mentions conferral "in" the Constitution (Articles I-3, I-11, II-111) or "in this Treaty" (Article IV-445). These references offer no difficulty in interpretation, because they are neutral as to the source of conferral. More problematic are statements that the Union's powers are conferred by the Constitution itself (Article I-12, I-14) or by an article of the Constitution (Article III-315). These provisions reflect the EC Treaty, which speaks of the Community enjoying powers "conferred on it by this Treaty," but they are different from expressions in Articles I-1 and I-11 that describe conferral as a grant directly from the Member States. Whether this difference constitutes an inconsistency is debatable. On one hand, one could contend that conferral by the Constitution itself suggests a communal origin, rooted in the peoples of Europe rather than in the Member States. The better argument would seem to be that the authors of a treaty are none other than the *states* that are party to it, that the treaty (or Constitution in this case) has no existence or character

[615] This statement bears a striking resemblance to the Tenth Amendment to the United States Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The doctrine of limited federal authority in the American system is complex and highly developed. Interestingly, Erwin Chemerinsky writes that from 1937 to 1995 not one federal law was declared unconstitutional as violating the limits of Congressional power. However, since 1995 a more conservative Supreme Court "has revived the Tenth Amendment" and is beginning to indicate its willingness to declare limitations on the federal power. See Erwin Chemerinsky, Constitutional Law Principles and Policies 230-31 (2002).

[616] Within the EC Treaty there are some references to the treaty's conferral of powers on Community institutions. For example, EC Treaty Article 7(1) notes that each of the institutions "shall act within the limits of the powers conferred upon it by this Treaty." Article 5 is the only provision that mentions conferral of power on the Community as a whole.

whatsoever without its parties, and that such a document by itself cannot confer any powers or competences.

It might at least be said that the various descriptions of conferral reflect a lapse in good drafting that might have been avoided. Nevertheless, it must be agreed that the Constitution underscores the role of the Member States as the parties with inherent power who choose to confer limited powers on the European Union. Two commentators have observed that this expression of conferral "underlines that Union competences derive from the Member States who remain the 'masters of the treaties'."[617] The ratification requirement relating to the Treaties and the Constitution augments this idea, because it is the Member States whose approval creates the Union and endows it with the powers it enjoys.

2. SUBSIDIARITY AND PROPORTIONALITY

The principles of subsidiarity and proportionality are limitations on EU action and thus reservations of rights in the Member States. The terms themselves have the sound of Euro-jargon, but the Constitution offers quite concise definitions. Article I-11(3) states:

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Article I-11(4) defines proportionality as follows: "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution." Proportionality is not expressly limited to Union action outside the areas of its exclusive competence, and thus it arguably applies even to matters of EU exclusivity. However, the very concept of exclusivity would seem to entail the widest possible discretion as to the scope of action taken (always bearing in mind the "objectives of the Constitution").

Subsidiarity and proportionality are both carryovers from the EC Treaty. The second subparagraph of EC Treaty Article 5 states:

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[617] Lars Hoffmann & Jo Shaw, Constitutionalism and Federalism in the 'Future of Europe' debate: The German Dimension, The Federal Trust Online Paper 03/04, at 7, available at http://www.fedtrust.co.uk/uploads/constitution/03_04.pdf.

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Without using the term "proportionality," the third subparagraph of Article 5 adds: "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty." TEU Article 1, which states that in the EU "decisions are taken . . . as closely as possible to the citizen," has been described as "a broader expression of subsidiarity."[618] In a similar vein, the preamble to the TEU notes the resolve of the Member States "to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity." Article 2 of the TEU states the Union's objectives and notes that they are to be carried out "while respecting the principle of subsidiarity as defined in Article 5 of the [EC Treaty]."

In an article that compares the European Union concept of subsidiarity with its antecedent in Catholic doctrine,[619] N. W. Barber notes three "operative elements" within EC Treaty Article 5:

> First, the Article contains a preference for power to be allocated to the smaller unit: Member States . . . Second, this allocation of power is qualified by an efficiency test. Power should be shifted downwards unless the centralization of power will result in efficiency gains . . . Lastly, it is implicit in Article 5 that the power should be exercised by the Member State that will be affected by the power.[620]

The primary change in the Constitution's formulation of the subsidiarity rule is that Union action must be weighed against what could be achieved by the Member States "either at central level or at regional and local

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[618] P. W. Barber, The Limited Modesty of Subsidiarity, 11 Eur. L.J. 308, 312 (2005).

[619] The Catholic catechism defines subsidiarity as a concept by which "a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help co-ordinate its activity with the activities of the rest of society, always with a view to the common good." Catechism of the Catholic Church, United States Conference of Catholic Bishops, art. 1, ¶ 1883, available at http://www.usccb.org/catechism/text/pt3sect1chpt2.htm.

[620] Barber, supra note 618, at 311-12.

level." The EC Treaty merely mentions action "by the Member States." In the matter of proportionality, the EC Treaty states that "any action" by the Community must not "go beyond what is necessary" to achieve the treaty's objectives. The Constitution requires that "the *content and form* of Union action shall not exceed what is necessary" to achieve the Constitution's objectives. (emphasis supplied)

Expanding on the Constitution's definitions, Constitution Article I-11(4) adds that the EU institutions must apply the subsidiarity and proportionality principles in accordance with "Protocol on the application of subsidiarity and proportionality" (Protocol on Subsidiarity).[621] This protocol requires each EU institution to "ensure constant respect" for the principles,[622] it requires the Commission to "consult widely" before proposing legislation, [623]and it requires the institutions to forward both drafts and final legislation to the national parliaments of the Member States for review.[624] Proposed legislation must be accompanied by statements and substantiating data to demonstrate that it complies with the two principles.[625] The national parliaments may object to legislation on the grounds that it fails to meet the subsidiarity standard,[626] and in most instances if one-third of all votes allocated to the parliaments (two votes per nation, one per each legislative chamber in bicameral legislatures) concur in the objection, the legislation "must be reviewed" by the Commission or other institution that has proposed the act.[627] The parliaments that force such a review cannot actually block the legislation, but the initiating institution must give reasons for maintaining, amending or withdrawing the legislation.[628] The European Court of Justice is granted jurisdiction to hear challenges based on violation of subsidiarity, and such challenges may be brought by Member States or the Committee of the Regions.[629] The Commission must submit annual reports on compliance with Article I-11.[630]

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[621] See Protocol on Subsidiarity, supra note 273.
[622] Id., art. 1.
[623] Id., art. 2.
[624] Id., art. 4.
[625] Id., art. 5.
[626] Id., art. 6.
[627] Id., art. 7. Certain legislation requires only one-fourth of the possible votes to comprise an objection that triggers a review. Id.
[628] Id.
[629] Id., art. 8.
[630] Id., art. 9.

Related to the Protocol on Subsidiarity is the "Protocol on the role of national parliaments in the European Union" (Protocol on National Parliaments).[631] This protocol requires the Commission and other EU institutions to forward reports, proposed legislation and other items to the national parliaments for review.[632] The protocol requires a six-week review period between notification and adoption of proposed legislation[633] (six months in the case of certain proposed amendments to the Constitution),[634] but it refers to the Protocol on Subsidiarity for the procedures by which one or more parliaments may object to legislation on subsidiarity grounds.[635]

The Protocol on Subsidiarity and the Protocol on National Parliaments were transferred from the Treaties, although both were amended. Both originated in 1997 in the Treaty of Amsterdam as additions to both the EC Treaty and TEU.[636] As appended to the Constitution the Protocol on Subsidiarity offers significant procedures and rights that were entirely absent in the treaty version. In particular, the new protocol offers the requirement of notifying national parliaments of proposed legislation, the opportunity for parliaments to object to legislation and force a review, and the right of a Member State to challenge legislation at the Court of Justice. The Constitution's Protocol on National Parliaments also offers more than its predecessor. The new version expands the list of matters that must be forwarded to the national parliaments for review, references the objecting procedure in the Protocol on Subsidiarity, and offers an unprecedented six-month review period relating to certain proposed amendments to the Constitution.[637]

Several observations can be offered regarding the Constitution's refinements to the principles of subsidiarity and proportionality. First, the Constitution's rewording in the description of subsidiarity, referring to central, regional and local levels of the Member States rather than simply to

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[631] Protocol on National Parliaments, supra note 273.
[632] Id., arts. 1, 2, 5, 6, 7.
[633] Id., art. 4.
[634] Id., art. 6.
[635] Id., art. 3.
[636] Protocol on the role of national parliaments in the European Union, Nov. 10, 1997, O.J. (C 340) 113; Protocol on the application of the principles of subsidiarity and proportionality, Nov. 10, 1997, O.J. (C 340) 105.
[637] For a discussion on the general role of national parliaments within the EU, see Heidi Hautala, The Role of Parliaments in the EU Constitutional Framework: A Partnership or Rivalry? in The EU Constitution: The Best Way Forward? (Deirdre Curtin, Alfred E. Kellermann & Steven Blockmans, eds., 2005).

the states, is at best a nuanced expansion in the concept of how potential state action is to be viewed. The new language does not suggest an actual shift in the definition or substance of subsidiarity. Second, the Constitution's change in language relating to proportionality, substituting "the content and form" of EU action for "any action," does not seem intended to alter the substance of the proportionality principle. Third, the Protocol on Subsidiarity is upgraded to a substantial extent. The rights of national parliaments to review, make objection and challenge EU legislation on subsidiary grounds arguably put more teeth into the principle, although Michael Dougan has criticised this "early warning system on subsidiarity which suffers from almost enough operational flaws to undermine the arguments supporting its very existence."[638] Finally, the changes to the Protocol on National Parliaments are less dramatic, but they do offer somewhat more information to the Member States to enable them to review proposed EU legislation.[639]

Subsidiarity and proportionality may be seen as logical extensions of the conferral principle, in that they contribute to protecting the residuum of Member State power. With the EU limited to the competences specifically granted under the Constitution, and with all other authority reserved to the Member States, subsidiarity and proportionality support these concepts by requiring the Union to behave prudently even when it is permitted to act. Under the Constitution the new procedures adding a measure of enforcement to the rule of subsidiarity arguably add more legal character to the principle, but it remains the object of scepticism as to its actual impact. For example, Lars Hoffmann and Jo Shaw assert that "in reality the [subsidiarity] principle itself is both unclear and widely regarded as rather toothless."[640] They contend

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[638] Michael Dougan, The Convention's Draft Constitutional Treaty: Bringing Europe Closer to its Lawyers, 28 Eur. L. Rev. 763, 793 (2003).

[639] Two commentators have noted the EU has permitted expansion of the activities of national parliaments beyond the formal role provided in the protocols and beyond the concepts of subsidiarity and proportionality. First, "the EU has produced laws on topics considered beyond the traditional remit of national parliaments," and as a result the national governments have produced "new domestic laws in those areas that not only incorporate but also build upon EU law." Second, "the EU has facilitated communication and data sharing across Member States. The resulting knowledge has helped legislators and government officials design more effective legislative frameworks. This has confirmed national parliaments as viable regulatory institutions." Francesco Duina & Michael J. Oliver, National Parliaments in the European Union: Are There Any Benefits to Integration?, 11 Eur. L.J. 173, 174 (2005).

[640] Hoffmann & Shaw, supra note 617, at 6. For a recent wide-ranging criticism of subsidiarity, see Gareth Davies, Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time, 43 C.M.L.R. 63 (2006).

that subsidiarity "has never been successfully invoked, for example, before the Court of Justice as a basis for finding that a measure should not have been adopted by the EU institutions."[641] P. W. Barber acknowledges that subsidiarity has not been credited with any overt decisions by the Court, but he nevertheless believes that the principle is deserving of respect:

> The European principle of subsidiarity is important because it is one of the key constitutional principles that serve to set the character of the EU. As a legal principle, a justiciable constraint on the power of the Community Institutions, subsidiarity has had little obvious effect. Perhaps daunted by the complicated political assessments the principle entails, or, less charitably, perhaps disinclined to develop a principle that limits the centralization of power, the European Court of Justice has not made use of the principle. The degree to which subsidiarity has indirectly affected measures advanced by the Community is unclear. But the principle stands as a declaration of how the EU perceives itself, and as the sort of political community the authors of the Treaties intended it to be. In particular, it represents a commitment to democracy, to de-centralised power and, most importantly, opposition to nationalist ideals of state legitimacy.[642]

Michael Dougan asserts that the Constitution's innovations "should help give more practical force to the principle of subsidiarity," but he argues that the Constitution still lacks "a truly coherent conception of the role national parliaments should play with the Union legislative process."[643] He contends that there are "major gaps" in the Member States' ability to function effectively, but he also argues that if the new provisions were inserted as mere "window dressing . . . to enhance the Union's democratic credentials," then the Convention and IGC have run the risk of "complicating and prolonging still further the Union's legislative procedures."[644]

Even without the Constitution, the EU leadership has indicated its intention to pay greater attention to subsidiarity and proportionality. Conferences in The Hague in 2005 and in St. Pölten, Austria, in 2006 led the

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[641] Id.
[642] Barber, supra note 618, at 324-25.
[643] Dougan, supra note 358, at 6.
[644] Id. For additional analysis of the subsidiarity principle and the role of national parliaments in EU legislation, see Anna Verges Bausili, Rethinking the methods of dividing and exercising powers in the EU – Reforming subsidiarity, national parliaments and legitimacy, in Shaw, supra note 29, at 95. See also Collignon, supra note 29, at 84-87.

European Council in its June, 2006 Presidency Conclusions to endorse an ongoing examination of new approaches to application of these principles.[645] In addition the Conclusions welcomed the Commission's commitment to carry out greater consultation with national parliaments on new Union legislation, and the European Council specifically "invited" the Council, Parliament and Commission to "consistently check the correct application of the principles and guidelines laid down in the Protocol on subsidiarity and proportionality."[646]

3. PRIMACY

The effectiveness of EU action within the Union, that is, within each of the Member States of the Union, has its legal basis in the principle of primacy.[647] Article I-6 of the Constitution states: "The Constitution and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States." The Member States in turn are required by Article I-5(2) to take "any appropriate measure . . . to ensure fulfillment of the obligations flowing from the Constitution or resulting from the acts of the institutions of the Union." Closely connected to the concept of primacy is the principle articulated in Article I-33(1) that "European laws," which are legislative acts of the Union "of general application," are binding in their entirety throughout the EU and are "directly applicable in all Member States." Under Article I-33(1) certain "European regulations" may also be binding in their entirety and directly applicable in all of the Member States.

The Treaties do not contain the word "primacy." However, Article I-5 of the Constitution is a carryover from EC Treaty Article 10, which imposes all of the following obligations on the Member States:

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[645] European Council, Presidency Conclusions, supra note 5, at 13.

[646] Id. at 14.

[647] In American constitutional parlance, primacy is referred to as "supremacy," with Article VI of the United States Constitution declaring that Constitution itself and federal law "shall be the supreme Law of the Land." Another term commonly used in American jurisprudence is "pre-emption," and the U.S. Supreme Court has declared that "under the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" Gade v. National Solid Wastes Management Association, 505 U.S. 88, 108 (1992). See also Chemerinsky, supra note 615, at 376-401.

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

Furthermore, Article 249 of the EC Treaty defines a "regulation" of the Community (renamed in the Constitution as a "European law") as a measure that "shall have general application. It shall be binding in its entirety and directly applicable in all Member States." Although the Treaties do not explicitly state that EU law has primacy, the concept is implicit. For example, if a Member State has law that is inconsistent with EU law on the same subject, and if the state is required to "ensure fulfilment" of the EU law, then the Treaty obligation would require the state to follow EU law in preference to its national law. The practical result would be the superior force of Union law – indeed its primacy over the Member State's law. The Constitution's expression of the concept is evidently intended to clarify the point, but as noted below, primacy has its limits, and some scholars argue that its nuances may well have survived.

Despite the imprecise manner in which the Treaties deal with primacy, case law interpreting the Treaties has firmly established the principle. The first decision was the 1963 ruling in the matter of *Van Gend en Loos v. Nederlandse Administratie der Belastingen.*[648] In this case the Court of Justice ruled that the authority of the EC Treaty was not dependent upon any national implementing legislation or any other measure taken by a Member State. The second ruling was in the 1964 case of *Costa v. ENEL,*[649] in which the Court declared that Community law must be superior to national law because of the nature of the Community legal order:

> [T]he law stemming from the [EC] Treaty could not, because of its special and original nature, be overridden by domestic legal considerations, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.
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> The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising

[648] Case 26/62, van Gend en Loos, supra note 58.
[649] Case 6/64, Costa v. ENEL, 1964 ECR 585.

> under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.[650]

A further ruling in 1970 affirmed the primacy of Community law even over a national constitution. In *Internationale Handelsgesellschaft m.b.H v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel* the Court declared:

> [T]he validity of a Community instrument or its effect within a Member State cannot be affected by allegations that it runs counter to either the fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.[651]

Primacy flows from the propriety of the action taken. Any act of the Union that exceeds its conferred authority would presumably lack legal validity and thus could not have primacy over Member State law. For example, the Constitution identifies two specific fields in which EU activity is curtailed. Article III-425 of the Constitution states: "The Constitution shall in no way prejudice the rules in Member States governing the system of property ownership." Similarly, Article III-436 states that the treaty may not interfere with the right of a Member State to withhold information it considers vital to its national security, or the right of a state to protect its "production of or trade in arms, munitions and war material" as long as this protection does not have an anti-competitive effect in the internal market outside the military sphere. Article III-425 is taken directly from Article 195 of the EC Treaty, and Article III-436 is virtually identical to EC Treaty Article 296. In these fields the Member States retain exclusive control, their laws enjoy absolute primacy, and their activities are exempt from interference by EU law.

Another limitation on primacy arises from the fact that certain EU law depends on implementation at the Member State level. Article I-33(1) of the Constitution creates a classification called "European framework law," an EU legislative act that is "binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." Other than its new label "European framework law," Article I-33 is essentially transposed from EC Treaty Article 249, which states that a "directive" is a Community act that "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of

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[650] Id. at 594.

[651] Case 11/70, Internationale Handelsgesellschaft m.b.H v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel, 1970 ECR 1125, 1134.

form and methods." In similar fashion, Constitution Article I-33(1) describes a class of "non-legislative act" under the name "European regulation," which may be designated as fully binding and directly applicable in the Member States, or may be declared to be "binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." The EC Treaty does not offer a counterpart to "European regulations," and it should be noted that the Treaty's instrument called a "regulation" is the primary form of EU legislation, which the Constitution has renamed as "European laws." Whether under the EC Treaty or the Constitution, the described EU instruments are subject to further action at the Member State level. They are by themselves binding only "as to the result to be achieved," but not as to the "form and methods" of achieving that result.[652] The significance of this type of EU legislation is that if each Member State is permitted to determine the details for governing the regulated activity within its own territory, then it might be argued that the control over that activity – the primacy of authority, if you will – is shared between the EU and the state.

Beyond these obvious qualifications, certain commentators have argued that primacy is subject to complexities not readily apparent in the Constitution's appealingly simple formulation.[653] Paul Craig raises several concerns, including his assertion that the wording of Article I-6 leaves room to argue that EU law has primacy over national legislation, but not over national constitutions.[654] He also questions whether EU regulations should have primacy equal to EU legislation, whether the Member States retain a residual competence (*Kompetenz-Kompetenz*) to decide issues of primacy,[655]

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[652] Constitution art. I-33(1).

[653] For a review of the supremacy issue as the subject of long-standing judicial and academic attention, see Mattias Kumm, The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty, 11 Eur. L.J. 262 (2005).

[654] Paul Craig, What Constitution does Europe Need? The Federal Trust Online Paper 26/03, at 8, available at http://www.fedtrust.co.uk/uploads/constitution/26_03.pdf.

[655] George Bermann notes the "slowly growing number of Member States whose supreme or constitutional courts have, following the German example, in effect stated that, while they intend for them and their national judiciaries to show the highest degree of respect for the pronouncements of the Court of Justice (even on matters as sensitive and important as protection of human rights and fundamental freedoms), they will not in principle cede to that Court ultimate authority for determining the outer boundaries of the EU's legislative and policy powers. Under that view, Kompetenz/Kompetenz does not lie in Luxembourg (except of course for Luxembourg); it lies in the seats of the highest courts of the Member States, almost as if in the USA it lay, as it assuredly does not, in the state capitals." Bermann, supra

and whether the principles of subsidiarity and proportionality limit the scope of primacy.[656] He assures the academic world that Article I-6 will not "signal the death of one of the staple topics in EU law courses."[657] Mattias Kumm likewise comments that "the supremacy clause does not by itself say who should settle the question whether EC legislation is or is not *ultra vires*, even though this is exactly the issue [that] has been the subject of disagreement between the Court of Justice and some national courts.[658] Michael Dougan also questions "the merits of the Convention's attempt to codify a principle characterised by sophisticated nuance in the [EU] caselaw, and extensive debate among academics."[659] He suggests that "we should accept that this [Article I-6] is a largely hortatory provision which offers little of substance to the complex debate on relations between the Union and domestic legal orders."[660]

Surely the matter of primacy has been the subject of much nuance under the regime of the Treaties. Equally certain is the fact that certain scholars and national courts have thus far resisted the notion that the Court of Justice alone should have the authority to decide matters of the EU's competence. Admittedly, the argument that national courts have authority to determine Union competence may have some merit when the primacy concept exists primarily by virtue of pronouncements by the Court of Justice itself. However, the above commentators seem too quick to dismiss what the Constitution actually says. First, Article I-6 for the first time offers a clear and explicit textual declaration on primacy. Second, with regard to existing decisions of the Court, Article IV-438(4) states:

> The case-law of the Court of Justice of the European Communities and the Court of First Instance on the interpretation and application of the treaties and acts repealed by Article IV-437, as well as of the acts and conventions adopted for their application, shall remain, *mutatis mutandis*, the source of interpretation of Union law and in particular of the comparable provisions of the Constitution.

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note 47, at 367. For a general analysis of the Constitution and its impact on the sovereignty of the Member States' constitutional courts, see Albi & Van Elsuwege, supra note 116.

[656] Id. at 8-9.

[657] Id. at 8.

[658] Kumm, supra note 653, at 296.

[659] Dougan, supra note 358, at 7.

[660] Id. at 8.

Third, going forward, Article I-29(1) identifies the Court of Justice as the institution that "shall ensure that in the interpretation and application of the Constitution the law is observed." Taken together, these three provisions suggest a change from the past, and it may be profound. The words of Article I-6 are not subtle, nor are they qualified except by the conferral principle. Article IV-438(4) identifies existing EU case-law as *the* source of interpretation existing Union law and of comparable provisions of the Constitution. Article I-29(1) affirms the basic role of the Court. Arguably the cumulative effect of these three articles is to eliminate any doubt that EU law is supreme and that the Court of Justice is the ultimate source of its interpretation.

But even this new legal order has its boundaries. Nathan Gibbs, has set the primacy principle next to the Article I-11 conferral provisions and has evaluated their joint impact. He observes:

> Taken together, both provisions explicitly reinforce the post-state characteristics of the evolving European constitution. The first [primacy] confirms the supranational characteristics of the EU legal order, the way in which it cuts across the regulatory authority of the Member States. The second [conferral] confirms that the European Union will not itself evolve into a statal constitutional order. This is significant in so far as it places the burden of further EU integration, not so much on any large institutional scheme, but rather on the more flexible arenas of substantive policy coordination currently explored through the various "new governance" procedures. The Constitutional Treaty thus offers an implicit confirmation of the current developments in European constitutionalism and its move away from the liberal constitutional model.[661]

In the end, the Constitution's statement on primacy proved to be too controversial to survive. The June 2007 IGC decided to omit the provision from the Reform Treaty, and in its place a Declaration will refer to the "well settled case-law of the EU Court of Justice."[662]

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[661] Nathan Gibbs, Examining the Aesthetic Dimensions of the Constitutional Treaty, 11 Eur. L.J. 326, 341 (2005). For an analysis of "new governance" procedures in the EU, see the discussion in part 5 of this chapter.

[662] Presidency Conclusions, supra note 19, Annex I at 16, n. 1.

4. EXCLUSIVITY

The concept of exclusivity arises from the Constitution's classification of powers. Certain delineated competences are granted to the EU alone, others are shared between the EU and the Member States, and in other areas the Member States act with the EU providing a measure of coordination.[663] Article I-12 explains the differences between the categories, while Articles I-13 to I-17 describe the areas of activity that fall within each category, as follows:

(1) Article I-13(1) lists the following areas as exclusive to the EU: the customs union, competition rules necessary for the functioning of the internal market, monetary policy for the euro-zone states, conservation of marine biological resources under the common fisheries policy and the common commercial policy (international trade policy of the Union.) In addition, Article I-13(2) grants the EU exclusive competence to conclude international agreements relating to these fields. According to Article I-12(1), where the Constitution assigns the EU an exclusive competence, only the Union may legislate unless it assigns authority to the states or the Union act requires Member State implementation.

(2) Article I-14(2) delineates the areas of "shared competence" as the following "principal" areas: the internal market; social policy "for the aspects defined in Part III [of the Constitution];" economic, social and territorial cohesion; agriculture and fisheries, excluding conservation of marine biological resources; environment; consumer protection; transport; trans-European networks; energy; the area of freedom, security and justice; and common safety concerns in public health matters "for the aspects defined in Part III." Article I-12(2) explains that in these areas the EU and Member States may act, but Member States may legislate only "to the extent that the Union has not exercised, or has decided to cease exercising, its competence." However, Article 14 contains exceptions to the rule of Article I-12 – the fields of research, technological development, space, development cooperation and humanitarian aid are identified as areas of shared competence, but Union action in these fields will not preclude Member State action.[664]

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[663] Prior to the 2002-2003 Convention, in a wide-ranging discussion of what a constitution might accomplish, Jürgen Habermas wrote that everyone could agree "that delimitation of the competences of federal, national and regional levels is the core political issue to be settled by any European constitution." Jürgen Habermas, Why Europe Needs a Constitution, 11 New Left Rev. 5, 26 (2001).

[664] Constitution art. I-14(3), (4).

(3) Articles I-12(3) and I-15 relate to coordination of Member State economic and employment policies and to creation of a common foreign and security policy. The Union is expected to provide coordination, but basic responsibility for national policy is left with each Member State.

(4) Article I-12(4) permits the Union to "define and implement a common foreign and security policy, including the progressive framing of a common defence policy." Article I-16(1) notes that these matters include "all areas of foreign policy and all questions relating to the Union's security." The Member States are to "actively and unreservedly" support these policies.[665]

(5) Article I-17 identifies the following areas in which the Union may carry out "supporting, coordinating or complementary action" at the European level: protection and improvement of human health; industry; culture; tourism; education, youth, sport and vocational training; civil protection; and administrative cooperation. Article I-14(1) identifies these areas as fields in which the Union is *not* required to share competence: "The Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to areas referred to in Articles I-13 [exclusive competence] and I-17." However, the EU's own competence relates only to supporting, coordinating or complementary action. Article I-12(5) makes it clear that in these areas the Union may not supersede the underlying competence of the Member States, and Union acts may not "entail harmonisation of Member States' laws or regulations."

The approach of the Treaties is far more scattered and far less clear than presented in the Constitution. Competences in specific fields are found in the substantive provisions relating to that field, rather than a series of broad statements. The following are examples of how the Treaties deal with competences and exclusivity:

(i) EC Treaty Article 5 notes that in areas outside its exclusive competence, the Community may act only in accordance with the principle of subsidiarity. However, the treaty offers no definition as to which substantive matters fall within this exclusive competence.

(ii) Article 127(1) of the EC Treaty permits the Community to encourage Member State cooperation in the field of employment policy, but it requires respect for "the competences of the Member States," and Article 129

[665] Constitution art. I-16(2).

states that the Community's measures "shall not include harmonisation of the laws and regulations of the Member States.

(iii) EC Treaty Articles 131 to 134 govern the common commercial policy of the Community, which the Constitution designates as an area of exclusive EU competence. Article 133(6) deals with negotiation of international trade agreements by the Community, but it states that an agreement "may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation." Article 133(6) further designates certain subjects as falling within "the shared competence of the Community and its Member States."

(iv) EC Treaty Article 137(4) states that Community activities in the field of social policy may not affect "the right of Member States" to define their own fundamental principles. Respect for the "responsibility" or "responsibilities" of the Member States is found in relation to Community support for education (Article 149(1)), vocational training (Article 150(1)) and public health (Article 152(5)).

(v) EC Treaty Article 174(4) speaks of the Community and Member States acting within "their respective spheres of competence" to cooperate with third countries and international organisations in the field of environmental protection, but any action must be "without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements." Similar statements are made in Article 181 with regard to Community activity in the field of development cooperation, and in Article 181a(3) in relation to economic, financial and technical cooperation with third countries.

(vi) TEU Article 11 requires the Union to pursue a common foreign and security policy, and the Member States are required to support it. However, as further explained in Chapter 17 of this treatise, the Member States retain substantial power in this field.

(vii) TEU Articles 29 to 42 call upon the EU to provide an area of freedom, security and justice, which Constitution Article I-14 delineates as an area of "shared competence." The TEU does not use the term "shared competence," but its focus is on coordination of a field in which the Member States retain substantial power. This area is further examined in Chapter 16 of this treatise.

(viii) TEU Article 43 permits "enhanced cooperation" among groups of Member States, but not in "the areas which fall within the exclusive competence of the Community."

The general difficulty with the Treaties is that they mention spheres of competence, shared competence, EU competence and Member State competence without ever delineating clearly just where EU activity will run afoul of authority reserved to the Member States. At best, the Treaties indicate what the Union is permitted to do in specific subject areas, but the Treaties' lack of precision on matters of competence creates a need for the Court of Justice to provide interpretation. This shortcoming was duly noted by the EU leadership in 2001. The Intergovernmental Conference at Nice stated that a re-evaluation of the EU should include addressing "how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity."[666] The Commission White Paper noted that the Union needs "clear principles identifying how competence is shared between the Union and its Member States."[667] The Laeken Declaration in late 2001, by which the IGC instituted the Convention on the Future of Europe, identified the critical need for the Convention to "clarify, simplify and adjust the division of competence between the Union and the Member States in light of the new challenges facing the Union."[668]

The Convention attempted to respond to these challenges. The approach in the Constitution represents a significant step forward toward helpful and necessary clarification as to where the dividing lines lie. However, the Constitution's approach in Articles I-12 to I-17 has several shortcomings. First, it is not comprehensive. The final provision of Article I-12 states: "The scope of and arrangements for exercising the Union's competences shall be determined by the provisions relating to each area in Part III."[669] This necessitates a careful review of the great textual detail of Part III, an exercise similar to that required to interpret the EC Treaty. In addition, two areas of shared competence identified in Article I-14 specifically refer to "the aspects defined in Part III."[670] Furthermore, the introduction to the list of shared competences in Article I-14(2) acknowledges that it is incomplete, by

[666] Nice Declaration, supra note 132, at 85.
[667] White Paper, supra note 52, at 34.
[668] Laeken Declaration, supra note 143, at 21.
[669] Constitution art. I-12(6).
[670] Constitution art. I-14(2)(b) (social policy), I-14(2)(k) (common safety concerns in public health matters).

referring to "the following *principal* areas." (emphasis supplied) This wording, along with the reference to Part III in Article I-12, compels the reader to look beyond the overview provided in Part I. However useful, Articles I-12 to I-17 are incomplete.

The second point of concern is that it is not clear as to why several subject areas are set apart from the three main types of competence (exclusive, shared and supporting, coordinating or complementary action). In Article I-14(3), matters of research, technological development and space are treated differently from the shared-competence items listed in I-14(2). The same is true for development cooperation and humanitarian aid in Article I-14(4). Furthermore, economic and employment policies are set apart in Article I-15, while matters of foreign and security policy are treated separately in Article I-16. Apparently there is a case for affording special treatment to each of these areas, but one could just as well argue for including them in the three general categories of competence.

Third, there is an inherent paradox posed by the Union's supporting, coordinating or complementary acts that under Constitution Article I-17 may be binding on the Member States, but under Article I-12(5) may not supersede Member State competence in the area and may not require harmonisation of national law. Paul Craig has argued that the entire area of supporting, coordinating and complementary action will prove to be "problematic."[671]

The preceding discussion illustrates that the matter of competences under the Constitution includes a substantial role for the Member States. In areas of activity under Articles I-15, I-16 and I-17, the Member States are in essence considered the primary actors, with the Union offering no more than support, coordination or complementary action. Shared competences under Constitution Article I-14 anticipate that the states will act where the EU chooses not to.[672] Even the areas of exclusive EU competence under Article I-13 may involve Member State action if the Union assigns such authority to the states.[673] Furthermore, regardless of whether competence is exclusive to the EU or shared with the Member States, in the case of European framework laws and certain European regulations it will be left to the Member States to pass implementing legislation.[674] While such framework laws and regulations emanating from the EU are binding on the Member States "as to the result to

[671] Craig, supra note 654, at 7-8. See the discussion in part 1.4 of Chapter 17.
[672] See also Constitution art. I-12(2).
[673] See also Constitution art. I-12(1).
[674] Constitution arts. I-33(1), I-37.

be achieved,"[675] by their nature they require, rather than preclude, Member State action in the subject field.

The allocation of competences, whether presented in a random fashion as in the Treaties or more clearly as in the Constitution, assists in defining what the European Union is and what its limits are. George Bermann describes the competence delineation as "an exercise whose evident purpose is to halt, or at least give the impression of halting, what has come in the trade to be known as the Union's competences 'creep'."[676] As illustrated above, the Constitution's clearer expressions also offer ample evidence that the EU is a dual system. The Union has substantial power, but the Member States are vital actors in its activities.

5. FLEXIBILITY

5.1 **EU action beyond its designated competences**

Even the highly detailed Constitution cannot anticipate every need for EU action. As a consequence, the drafters have included a flexibility clause, Article I-18, which allows the Union in limited circumstances to take steps beyond its designated competences. Article I-18(1) contains the following basic statement:

> If action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.

Substantively, Article I-18(1) requires that any step taken under the flexibility clause must be "within the framework of the policies defined in Part III, to attain one of the objectives set by the Constitution." Procedurally, the process begins with the Commission proposing an action and advising the Member State parliaments of the proposal.[677] Under the procedures described in Article I-11(3) and in the Protocol on Subsidiarity, the parliaments may issue a challenge if they believe that the proposal will violate the subsidiarity rule.[678]

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[675] Constitution art. I-33(1).
[676] Bermann, supra note 47, at 368.
[677] Constitution art. I-18(2).
[678] See discussion of this challenge procedure in part 2 of this chapter.

The next step is to obtain the consent of the European Parliament, and lastly the Council must vote unanimously to approve the action.[679] One further requirement under Article I-18 is that actions taken under the flexibility provision "shall not entail harmonisation of Member States' laws or regulations in cases where the Constitution excludes such harmonisation."[680]

The principal provision of Constitution Article I-18 is drawn from Article 308 of the EC Treaty. The EC Treaty provision states:

> If action by the Community should prove necessary to attain, in the course of operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Note that the EC Treaty refers to actions relating to "operation of the common market," while the Constitution refers to the subjects covered in its own Part III. The Constitution's realm of flexibility is thus more extensive, because, as further illustrated in Chapter 17 of this treatise, Part III of the Constitution encompasses much more than the internal market. In addition, the Constitution provides for consent by the European Parliament, rather than the mere consultation procedure under the EC Treaty. The Constitution's notification provision and its clarification regarding harmonisation of Member State law are also new. None of these differences significantly enhances the protections offered to the Member States under Article 308, although the Constitution's prohibition regarding harmonisation of Member State law may be seen as a benefit to the states.

The primary protection for the Member States in Article I-18 and in EC Treaty Article 308 is that Council decisions under the flexibility procedure must be taken unanimously, and thus each Member State can block the action. Also, because of the restriction on harmonisation of Member State law, the flexibility procedure may fill constitutional gaps, but it may not serve as a back-door method to avoid any specific harmonisation restrictions set forth in the Constitution.

Peter Ludlow has called Constitution Article I-18 "a potentially far-reaching enabling clause . . . which, like [EC Treaty Article 308], can and should obviate the need for future IGC's as long as the Council can agree

[679] Constitution art. I-18(1).
[680] Constitution art. I-18(3).

unanimously that changes are needed."[681] He argues that Article I-18 should be viewed in conjunction with Article IV-444, the simplified constitutional amendment procedure, which "allows the European Council, acting unanimously, to extend the provisions regarding the use of qualified majority voting" in Part III of the Constitution, and also in conjunction with Article I-40(7) "where the same principle is applied to foreign and security policy."[682] Ludlow notes that some critics have claimed that the unanimity requirement "negates the value" of these three articles,[683] but he believes that these criticisms are misleading. He contends:

> In certain cases, such as these, which involve 'fast track' decisions regarding the scope and character of the EU system as such, the unanimity requirement seems both reasonable and necessary. Actual experience further suggests that it need not inhibit boldness.[684]

Ludlow notes that the "radical expansion of the European Community's agenda in the 1970s into areas such as environmental policy, regional policy and the EMS was based on [EC Treaty Article 308] which also required unanimity."[685]

If EU officials determine that a law must be enacted or a decision taken that will enhance EU activity despite not being provided for in the Constitution, and if the matter is of a technical nature or does not infringe on any essential aspect of Member State sovereignty, then the flexibility clause would work in practice. Lack of controversy would lead to full cooperation and the necessary unanimity to see the matter through. Because of the procedural safeguards in Article I-18, employment of the flexibility clause would not likely have led to any extension of EU competences. Michael Dougan has commented that the flexibility clause "could not be used either to add new objectives to the Constitution, or to exceed the basic parameters of Union competence established in Part III."[686] However, Dougan does note that Article I-18 is slightly broader than its predecessor, Article 308 of the EC

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[681] Peter Ludlow, The Thessaloniki European Council, EuroComment Briefing Note, No. 2.3, July 3, 2003, at 28.
[682] Id. See Constitution arts. IV-444, I-40(7).
[683] For example, Michael Dougan observes that in an enlarged EU the unanimity requirement "automatically reduces the practical significance of the flexibility clause." Dougan, supra note 358, at 4.
[684] Id. at 28-29.
[685] Id. at 29.
[686] Id. at 4.

Treaty, in that the new provision is not limited to action tied to the "operation of the common market."[687]

Peter Norman comments that Articles I-18 and IV-444 of the Constitution "promise to put national parliaments on their mettle" because these provisions "have the potential to shift responsibilities from the member states to the Union."[688] He adds: "In both cases the national parliaments must be informed, giving them an opportunity to influence the decisions of their own governments." However, he warns that such "checks and balances" will be successful only if the Member State parliaments "pay heed to what is happening at the European Union level."[689] An alert parliament might be able to influence its country's Council or European Council representative before a decision is taken.

5.2 The Open Method of Coordination

While EC Treaty Article 308 provides a mechanism for the EU itself to act beyond its designated competences, there are instances in which action in new areas is not politically feasible (recall that Article 308 requires unanimity by the Council). In these circumstances, if there is a perceived need for centrally encouraged cooperation among the Member States, the EU has devised a process by which it can at least facilitate a common approach to national action. This process is known as the Open Method of Co-ordination (OMC). Because this activity does involve a measure of Union activity, a description of it is included in this section on the Union's flexibility.

The OMC was formally endorsed at the Lisbon IGC in March 2000, and has been described as follows:

> Its purpose was to spread legislative "best practices" across the Member States in areas where the EU has no competence for regulation. . . . Observers have described OMC as a clear effort on the part of the EU to encourage policy transfers among member states. OMC is in fact a compendium of mechanisms for cross-national communication.[690]

In the Open Method of Coordination the EU does not enact its own legislation or other measures. Rather, it carries out any of several different types of

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[687] Id.
[688] Norman, supra note 152, at 328-29.
[689] Id. at 329.
[690] Duina & Oliver, supra note 639, at 183.

activity: (1) it collects National Action Plans from the Member States and makes them available for public review; (2) it evaluates the National Action Plans and issues Joint Reports (of the Council and Commission) including recommendations of best practices; (3) it creates statistical indicators and other measurements relating to the information it is evaluating; and (4) it creates and supports Peer Review Programs such as conferences and exchanges among representatives of interested Member States.[691] In short, the OMC is an activity in which the EU fulfills the role of a facilitator, not a legislator or administrator.

The OMC has been controversial, and commentators David M. Trubek and Louise G. Trubek have summarised the debate as follows:

> Both those who favour the OMC as a mode of governance and those who question its desirability compare the OMC, implicitly or explicitly, with the Community Method. The Community Method is thought of as "hard law" because it creates uniform rules that Member States must adopt, provides sanctions if they fail to do so, and allows challenges for non-compliance to be brought in court. In contrast, the OMC, which has general and open-ended guidelines rather than rules, provides no formal sanctions for Member States that do not follow the guidelines, and is not justiciable, is thought of as "soft law". Proponents of the OMC argue that it can be effective despite – or even because of – its open-ended, non-binding, non-justiciable qualities. Opponents question that conclusion. They not only argue that the OMC cannot do what is needed to construct Social Europe and that "hard law" is essential, but also contend that use of the OMC could undermine efforts to build the hard law they think will be needed.[692]

Gráinne de Búrca has characterised the opposing "soft law" and "hard law" categories respectively as "new governance" and "traditional constitutionalism," and explains that new governance is necessary because the EU's "constitutional framework does not have a settled and embedded existence of the kind enjoyed by most national systems."[693]

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[691] Id. at 183-84.

[692] Trubek & Trubek, supra note 351, at 344.

[693] Gráinne de Búrca, The Constitutional Challenge of New Governance in the European Union, 28 Eur. L. Rev. 814, 815-16 (2003).
For additional relevant commentary, see Collignon, supra note 29, at 119-21.

Notwithstanding this theoretical debate, the EU has tackled employment issues through the OMC, and its European Employment Strategy was, after its first five years, judged a success by the Commission.[694] As a result, the OMC process has been applied under the Treaties[695] into additional subject areas, such as information technology, research and development, economic reforms, education, employment, social inclusion and pensions.[696] The OMC was described favorably in the Commission's White Paper on Governance, with the following endorsement: "In some areas it sits alongside the programme-based and legislative approach; in others, it adds value at the European level where there is little hope for legislative solutions."[697]

At the European Convention the process was the subject of much discussion,[698] and several provisions in the Constitution reflect the OMC. Article I-12(5) mentions Union competence "in certain areas and under the conditions laid down in the Constitution . . . to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas."[699] The same article states: "Legally binding acts of the Union adopted on the basis of the provisions in Part III relating to these areas shall not entail harmonisation of Member

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[694] European Commission, Taking Stock of Five Years of the European Employment Strategy, COM (2002) 416 final. In a discussion entitled "Soft law may be harder than you think," commentators Trubek and Trubek identify several different ways in which the OMC actually results in compliance by the Member States: "shaming, diffusion through mimesis or discourse, deliberation, learning and networks." Trubek & Trubek, supra note 351, at 356-59.

[695] Pertinent treaty articles are identified in the final paragraph of this section.

[696] Duina and Oliver, supra note 639, at 183.

[697] White Paper, supra note 52, at 21-22. Despite its general endorsement, the Commission warned of necessary limitations: "The use of the open method of co-ordination must not dilute the achievement of common objectives in the Treaty or the political responsibility of the Institutions. It should not be used when legislative action under the Community method is possible; it should ensure overall accountability in line with the following objectives:

> --It should be used to achieve Treaty objectives.
>
> --Regular mechanisms for reporting to the European Parliament should be established.
>
> --The Commission should be closely involved and play a co-ordinating role.
>
> --The data information generated should be widely available [and] provide the basis for determining whether legislative or programme-based action is needed to overcome particular problems highlighted.

Id. at 22.

[698] Trubek & Trubek, supra note 351, at 344.

[699] Note that under Constitution Article I-14(1) these fields are not areas of shared competence. See the discussion regarding exclusivity in part 4 of Chapter 12.

States' laws or regulations." In substantive areas, Article I-15(1) provides for EU "guidelines" to assist Member States to coordinate their economic policies, Article I-15(2) provides for EU "guidelines" to "ensure coordination" of Member State employment policies, and Article I-15(3) provides for EU "initiatives to ensure coordination of Member States' social policies."[700] Article I-17 identifies seven areas in which the EU "shall have competence to carry out supporting, coordinating or complementary action." These areas are protection and improvement of human health; industry; culture; tourism; education, youth, sport and vocational training; civil protection; and administrative cooperation. Specific provisions on each of these subjects are found in Part III of the Constitution, Articles III-278 to III-285, and are analysed in Chapter 17 of this treatise. The interplay of Articles I-17, I-15 and I-12(5) is also discussed above in this chapter in relation to exclusivity.

The Treaties do contain suggestions of the OMC, but less clearly than in the Constitution. Article 99 of the EC Treaty permits the Community to draw up guidelines for the Member States' economic policies, and to assist in coordination of those policies. Article 127(1) permits the Community to encourage Member State cooperation in the field of employment policy, but it requires respect for "the competences of the Member States," and Article 129 states that the Community's measures "shall not include harmonisation of the laws and regulations of the Member States." Articles 137 and 140 contemplate a variety of activities to coordinate the states' social policies. Several of the other substantive areas covered in Articles III-278 to III-285 of the Constitution are carried over from the EC Treaty as well.[701] Overall, it is fair to say that the flexibility available to the EU to encourage coordinated Member State activity in fields where the Union may not legislate is given greater recognition in the Constitution. However, Trubek and Trubek have argued that the Constitution's approach is indirect, its results "murky," and its text "ambiguous," and as a consequence the OMC "is hardly given the robust endorsement and full-blown constitutional status some hoped for." [702]

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[700] Additional provisions for issuance of EU guidelines and other coordinating activities on these subjects may be found in Part III. Articles III-178 to III-184 deal with economic policy; Articles III-203 to III-208 address employment policy; and Articles III-209 to III-219 address social policy.

[701] See part 1.3 of Chapter 17 (comparing the Constitution's provisions with the corresponding EC Treaty sections, if any.

[702] Trubek & Trubek, supra note 351, at 354. See also Myrto Tsakatika, The Open Method of Co-ordination in the European Convention: An Opportunity Lost?, in Dobson, supra note 29, at 90-102.

6. FOUNDATIONAL PRINCIPLES AND THE DIVIDING LINES

The principles discussed in this chapter do much to define the European Union, and they illustrate critical dividing lines between the Union and the Member States. Having said that, let us summarise the foregoing observations as to whether the Constitution would have impacted the dividing lines:

Conferral by the Member States to the Union is more clearly emphasised in the Constitution, but this does not appear to do anything other than state what was already the case. Thus, no shift in this dividing line.

Subsidiarity and *proportionality* are defined in the Constitution essentially as they are in the Treaties. However, the Protocol on Subsidiarity offers new opportunities for national parliaments to object to proposed EU legislation. Here a dividing line between EU legislative competence and national oversight would shift toward the Member States. One may argue that this only undercuts the efficiency of EU lawmaking, but the procedural rights of the states would be enhanced.

The Constitution's enshrinement of the *primacy* of EU law is arguably a step in the direction of greater Union authority. However, in light of the previous establishment of the principle through decisions of the Court of Justice, the Constitution's provision is essentially a confirmation of the status quo. From an academic point of view there may have been added value in committing the principle to constitutional text, and the new provision may have created nuanced enhancement of the Court pronouncements. Nevertheless, there is no obvious shifting of this dividing line.

The division of competences between the Union and the Member States, described above as the *exclusivity* principle, is much more clearly stated in the Constitution than it has been in the Treaties. However, we have seen that clarity can cut both ways, and that it does not necessarily favor either the Union or the states. By itself, clarity is a good thing, but in this instance it does not appear to shift any of the EU's dividing lines.

Finally, we have noted that the Constitution's *flexibility* clause, which permits legislation in areas not clearly specified in the document's text, is somewhat broader than its EC Treaty counterpart. Nevertheless, the existing legislative unanimity requirements are preserved, and thus the new clause would not shift any competences to the Union.

All in all, the drafters of the Constitution did not express these foundational principles in a fashion that would have shifted competences to the European Union. If anything, the Member States might have gained a bit in the right of their national parliaments to challenge EU legislation on the ground of subsidiarity. With that minor exception in favor the the states, the dividing lines illustrated in this chapter would have essentially stayed in place.

Part Three: Institutions and Decision-Making

As we have observed in Part Two, the European Union's essential character is defined through its stated values and objectives, its structural features, and certain core principles. These elements work in combination to drive the Union's agenda, but also to limit its activities. We will now turn from the Union's basic identity to a review of the *means* by which EU policy is carried out. Chapter 13 will describe in detail the EU institutions, and Chapter 14 will analuse the instruments and procedures used by them in making EU law. Chapter 15 will focus on where the Constitution would have replaced unanimous decision-making with qualified majority voting and where it would have applied QMV to new subjects of EU activity. Throughout this analysis, the EU's dividing lines will reveal themselves. The Union's institutional structure reflects careful attention to the limits placed on EU competences, and the opportunities for individual Member State influence are readily discernible.

Chapter 13

The EU Institutions and Organs

The Constitution contains articles that identify and describe the following institutions and organs:

--European Parliament
--European Council
--Council of Ministers
--Commission
--Court of Justice
--European Central Bank
--Court of Auditors
--European Investment Bank
--Advisory Committees: Committee of the Regions, Economic and Social Committee

These bodies are likewise identified in the Treaties, with most detail being presented in the EC Treaty. Because the Treaty on European Union "builds on" the EC Treaty, the drafters of the TEU saw no need to repeat the broad descriptions already included in the earlier document.

The Constitution in general maintains the assigned roles of all of the EU institutions – the internal balance of power within the Union – with little variation from the Treaties. Nevertheless, certain changes are proposed under the Constitution, and these changes have the potential of affecting both the institutional balance and the dividing lines between the Union and its Member States. The most notable developments are the new "permanent" European Council Presidency and the new Union Minister for Foreign Affairs. These and other matters of structure are described in this chapter, with a focus on the institutions' existence, characteristics and competences. Their specific

responsibilities in carrying out the EU's substantive activities are noted at various points throughout this treatise.

1. EUROPEAN PARLIAMENT

1.1 **A functioning parliament for the Union**

Under the Constitution the European Parliament bears reasonable resemblance to a traditional national parliament in its makeup and its function. Article I-20 of the Constitution introduces the Parliament and provides that it is elected by popular vote of the EU citizens, elects its own officers and participates in enacting legislation and approving the EU budget. Part III of the Constitution provides further detail about the institution and its workings.[703] Article III-336 states that Parliament is to meet annually and may hold special sessions. Article III-331 acknowledges that its members are affiliated with European-level political parties, and Article I-46(4) notes that these parties "contribute to forming European political awareness and to expressing the will of citizens of the Union." According to Article III-339, the Parliament is to determine its own rules of procedure, although Article III-338 mandates that decisions of the Parliament generally require a majority of the votes cast.

The EC Treaty offers detailed descriptions of the European Parliament, and its Article 7 lists the Parliament first in the list of EU institutions. Articles 189 to 201 provide the structural and operational details, which have largely been carried over into the Constitution. Article 189 introduces the Parliament. Article 190 provides that it is elected by popular vote of the EU citizens; Article 197 permits it to elect its own officers; and Article 192 permits it to participate in enacting legislation. Article 196 states that Parliament is to meet annually and may hold special sessions. Article 191 acknowledges that its members are affiliated with European-level political parties and notes that these parties "contribute to forming European awareness and to expressing the will of citizens of the Union." According to Article 199, the Parliament is to determine its own rules of procedure, although Article 198 mandates that decisions of the Parliament generally require a majority of the votes cast.

The Parliament is mentioned frequently in the TEU, with the most significant general reference being found in Article 5, where Parliament is identified as one of the primary EU institutions.

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[703] Constitution arts. III-330 to III-340.

With regard to inter-institutional relationships, Article III-333 of the Constitution permits the Parliament to set up committees of inquiry to investigate improper implementation of EU law, and Article III-335 assigns it the responsibility to appoint the permanent European Ombudsman to receive citizen complaints about EU institutions. Furthermore, under Articles I-20(1) and I-27(1) the Parliament, upon a proposal by the European Council, elects the President of the Commission, and under Article I-27(2) it approves the slate of Commissioners nominated by the President-elect. Under Articles I-26(8) and III-340 it can force the resignation of the entire Commission. Article I-22 provides that the Parliament is entitled to receive a report from the European Council President after each meeting of the European Council.[704]

EC Treaty Article 193 permits the Parliament to set up committees of inquiry to investigate improper implementation of EU law, and Article 195 assigns it the responsibility to appoint the permanent European Ombudsman to receive citizen complaints about EU institutions. Furthermore, under Article 214 the Parliament, upon a nomination by the Council, "approves" the President of the Commission and approves the slate of Commissioners nominated by the Council and the President-elect.[705] Under Article 201 it can force the resignation of the entire Commission.

The substantive changes from the EC Treaty to the Constitution include the following: Article 190 of the treaty provides for a Parliament of no more than 732 members, with no minimums or maximums stated, but with the

[704] Constitution art. I-22(2)(d).

[705] The appointment of the Commission in late 2004 illustrated that the Parliament's approval powers under EC Treaty Article 214 can be significant. Because of controversy surrounding certain Commissioners nominated by incoming president José Manuel Barroso, the Parliament threatened to reject his entire slate. In the face of such unprecedented opposition, Mr. Barroso made adjustments to the slate, and the newly configured Commission was accepted by the Parliament on November 18, 2004. One commentator has observed: "This marked a new stage in the development of the powers of the European Parliament, not through Treaty revisions, or soft law, or recourse to the European courts, but instead through the constitutionally mandated procedure for approving the members of the European Commission. Naturally, in flexing its legal muscles, the European Parliament improved its position in inter-institutional politics, notably in relation to the Commission. But the most significant gain was not to a specific institution but instead to the EU's constitutional system: it strengthened representative, democratic EU government." Francis Snyder, Editorial: Enhancing EU Democracy, Constituting the European Union, 11 Eur. L.J. 131 (2005).

precise allocation indicated for each Member State. The Treaties' Protocol on the Enlargement of the European Union permits increases in that number to reflect new accessions to the Union. The Constitution, in Article I-20(2), provides for a maximum of 750 members, with a minimum of six and a maximum of 96 for any Member State. Article III-404 of the Constitution expands the Parliament's role to full participation in the EU's budgeting process.[706] The little-used cooperation procedure under EC Treaty Article 252, by which the Parliament could affect the course of EU legislation but could not block a measure, is finally eliminated.[707] Under Article I-34(2) of the Constitution the "ordinary legislative procedure" is the co-decision procedure. This procedure is detailed in Constitution Article III-396, which, like Article 251 of the EC Treaty, allows the Parliament full participation in the legislative deliberation, coupled with the power to prevent a legislative measure from taking effect.[708]

From a drafting perspective and political point of view, it is interesting that the European Parliament is the first institution mentioned in Article I-19 of the Constitution, which identifies the EU's "institutional framework." The Parliament is also the first institution described in the separate institutional sections of Part I[709] and the first described in detail in Part III,[710] and it also enjoys top billing in Article 7(1) of the EC Treaty and in the institutional section of the EC Treaty.[711] This placement is reminiscent of the United States Constitution in which the Congress is the first institution described. The popular conception in the United States is that the Constitution's reference to Congress before the executive and judiciary implies that the Congress, as the body most representative of the people, is the premier branch of government. However, the political reality is otherwise –

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[706] Under Article III-404 the Parliament must approve all aspects of the budget and may propose amendments to it. Under Article 272 of the EC Treaty the Parliament's right to amend was limited to compulsory expenditures. Article 272(4) states that Parliament has a right "to amend the draft budget, acting by a majority of its Members, and to propose to the Council, acting by an absolute majority of the votes cast, modifications to the draft budget relating to *expenditure necessarily resulting from this Treaty or from acts adopted in accordance therewith.*" (emphasis supplied)

[707] EC Treaty art. 252. The only instances in which the cooperation procedure is found after the Treaty of Nice relate to certain matters of economic and monetary union. See EC Treaty arts. 99, 102, 103, 106.

[708] For an overview of the development of the Parliament, see Ricardo Passos, The Expanding Role of the European Parliament, in The EU Constitution: The Best Way Forward? (Deirdre Curtin, Alfred E. Kellermann & Steven Blockmans, eds., 2005).

[709] Constitution arts. I-20 to I-32.

[710] Constitution arts. III-330 to III-340.

[711] EC Treaty arts. 189-280.

for the past 75 years the US has been dominated by its executive branch. In the European Union the legislative assembly also represents the broadest spectrum of the EU citizenry, but despite the fact that Parliament's legislative and budgetary competences have grown steadily,[712] the Council and Commission continue to drive the EU agenda.

It is particularly notable that the European Parliament lacks the traditional power of a national legislature to appoint and remove the highest political officials – in the Union, both the European Council and Council are beyond Parliament's control. Also significant is the fact that Parliament is denied the most basic competence of a legislature, namely, the right to initiate legislation.[713] This power is generally reserved to the Commission, although under Constitution Article III-332 the Parliament may "request" the Commission to submit particular legislative proposals, and the Commission must inform the Parliament of its reasons if it does not comply with the request.[714] Article 192 of the EC Treaty also establishes the right of Parliament to request legislation, but without the requirement that the Commission justify its inaction if the request is not complied with.

While the Parliament's lack of legislative initiative is often viewed as a weakness in the EU system, particularly as regards the democratic legitimacy of the Union's legislative process, at least one commentator has seen a positive side to the matter. John Temple Lang has observed:

> One advantage of the "Community method" has been greatly underestimated. Since only proposals made by the Commission can be considered by the Council and the Parliament, it is impossible for lobbyists to get Members of the European Parliament to propose

[712] The Treaty of Rome created a Parliamentary Assembly with minimal supervisory powers over the Commission and a consultative role in legislation. Following a name change to European Parliament in 1962 and the first direct elections in 1979, the Parliament has gradually received greater supervisory, legislative and budgetary authority through subsequent treaties. The most significant step was the Maastricht Treaty's grant of co-decision authority with the Council in specific areas of legislation. Expansion of these areas, more supervision over the Commission through censure and Committees of Inquiry, and more involvement in the Union's budgetary procedures have enhanced Parliament's role as an important Union Institution. For a concise and useful analysis of the evolution of the Parliament, see Newman, supra note 42, at 174-83.

[713] Constitution art. III-332.

[714] Constitution art. I-26(2). In certain instances legislation may be initiated by a group of Member States, the European Parliament or other EU bodies. Constitution art. I-34(3).

> legislation. The "Community method" is a tremendous constraint on excessive legislation, and a valuable limitation on the powers of big business and vested interests. One has only to look at the United States to see how easily lobbyists can get Senators and Congressmen, anxious for re-election, to propose Bills on every conceivable subject. If the power of the Commission to influence policy is sometimes resented, its value as a safeguard against pressure groups should also be welcomed.[715]

Interestingly, although the Constitution does not offer a general legislative initiative to the European Parliament, Article I-47(4) creates an initiative procedure for EU citizens outside the normal institutional scheme. Carrying forward the Lang sentiments, this is arguably even worse than creating a parliamentary competence, and commentators have complained that this is a could "hijack" the Union's normal legislative processes.[716]

1.2 Elements of Member State control over the European Parliament

Under Article III-330(1) of the Constitution, the system for electing the Parliament is subject to both a unanimous vote of the Council and separate ratification by the Member State governments. In addition, the Council must vote unanimously on any rules relating to taxation of Parliament's members or former members.[717] And while Constitution Article I-20(2) sets a maximum size of the European Parliament and minimum and maximum numbers of representatives per Member State, the actual composition of the Parliament will be subject to a unanimous vote of the European Council. The Constitution's provisions are reflective of the EC Treaty, whose Article 190(4) requires a unanimous vote of the Council (not the European Council) and Member State "adoption" to approve the procedures for electing the European Parliament. Under Article 190(5), any rules relating to taxation of Parliament's members or former members also need unanimous approval by the Council. The primary difference between the EC Treaty and the Constitution is that Article 190(2) specifies the actual allocation of parliamentary seats to the Member States, while Constitution Article I-20(2) mandates that the Parliament's composition be determined by a unanimous vote of the European Council. In both documents unanimity is required – to amend the allocations in the EC Treaty (via a treaty amendment) and to assign seats under the Constitution.

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[715] John Temple Lang, The Commission: The Key to the Constitutional Treaty for Europe, 26 Fordham Int'l L.J. 1598, 1601 (2003).
[716] See part 3.1 of Chapter 9.
[717] Constitution art. III-330(2).

In many ways the Parliament may determine the procedures for its own operation.[718] However, in those instances identified above where the Council or European Council must decide unanimously on the composition of the European Parliament or the rules relating to its election or the taxation of its members, each of the Member States has the ability to block a decision or use the threat of a veto to influence the details of the decision. This is true of decisions made under the EC Treaty or under the Constitution.

The Parliament's inability to remove the European Council and Council carries with it two implications. First, it demonstrates the absence of a complete system of institutional checks and balances at the EU level. Second, it reflects a significant power residing in the Member States – representatives on the two Councils are ministerial level officials of the national governments, and as such they are answerable to their national parliaments. On the other hand, the limits of Parliament's *legislative* power do not correlate to any broad reservation of authority in the Member States, because the power to initiate EU legislation is generally in the hands of the Commission.[719]

2. EUROPEAN COUNCIL

2.1 **The European Council as the EU's highest authority**

The Constitution for the first time includes the European Council among the Union's institutions. Article I-19(1) identifies it as part of the EU's "institutional framework." Article I-21 provides basic information, while Article I-22 focuses on the European Council's President. Article III-341 provides additional information about the group's functions. The Constitution calls on the European Council to meet quarterly[720] to set the "general political directions and priorities" of the Union,[721] and the institution is mentioned more than 100 times in the document, in many instances with respect to taking decisions on policy matters. However, actual legislating is reserved to

[718] Both Constitution Article III-330(5) and EC Treaty Article 190(5) permit the Parliament, after consulting with the Commission and obtaining QMV approval of the Council, to determine the "general conditions governing the performance of the duties of its Members."

[719] See Constitution art I-34(3) (regarding instances in which legislation may be initiated by other EU institutions or by Member States).

[720] Constitution art. I-21(3).

[721] Constitution art. I-21(1).

the Council and the European Parliament,[722] because Article I-21(1) mandates that the European Council "shall not exercise legislative functions." Where decisions are taken, presumably outside the realm of actual legislation, the normal voting requirement is consensus.[723]

As set forth in Constitution Article I-21(2), the European Council is composed of the heads of state or government of each of the Member States, a President, and the President of the Commission; however, Article I-25(5) states that the latter two are not entitled to vote. The President of the European Council, described in detail in Article I-22,[724] is a new position created by the Constitution to replace the half-yearly rotating presidency under the Treaties.[725] The President will serve a two and one-half year term, renewable once,[726] and may not hold a national mandate during his or her term.[727] In addition to chairing the European Council, the President will provide cohesive external representation for the European Union[728] along with another newly created official, the Union Minister for Foreign Affairs, who is described in Constitution Article I-28.

The position of the European Council in the Treaties is less clear than in the Constitution. From the earliest days of the Community the heads of state met from time to time, and formal recognition of this process eventually followed. The first textual mention of the body was included in the Single

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[722] Constitution art. I-23(1).

[723] Constitution art. I-21(4). The Constitution provides in specific instances for European Council decisions to be taken by less than unanimity. For situations calling for a qualified majority vote, see Constitution art. I-22(1) (election of the European Council President), I-24(4) (establishing the list of Council configurations), I-24(7) (rotation of presidencies of Council configurations), I-27(1) (selection of the Commission President), I-27(2) (final approval of the Commission), I-28(1) (appointment or removal of the Union Minister for Foreign Affairs), III-382(2) (appointment of the Executive Board of the European Central Bank). Abstentions by a member of the European Council will not prevent unanimous decisions from being taken. Constitution art. III-341(1). The European Council may adopt its own procedural rules by simple majority vote. Constitution art. III-341(3). It may also decide by simple majority whether to examine proposed amendments to the Constitution and whether to convene a new constitutional convention. Constitution art. IV-443(2).

[724] The conditions of employment of the President are to be determined by a European regulation adopted by the Council. Constitution art. III-400(1)(a).

[725] EC Treaty art. 203.

[726] Constitution art. I-22(1).

[727] Constitution art. I-22(3).

[728] Constitution art. I-22(2).

European Act in 1986.[729] Compared to the many references to this body in the Constitution, it is cited just eight times in the EC Treaty[730] and eight times in the Treaty on European Union.[731] Interestingly, it is not identified in Article 7 of the EC Treaty in the list of Community institutions, nor in the articles that extensively describe the institutions in Part Five of the treaty. The most prominent treaty reference may be found in TEU Article 4, which corresponds to Article I-21 of the Constitution. Article 4 mandates the European Council to "provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof." The same provision defines the group as consisting of the heads of state or government of the Member States, assisted by the foreign affairs ministers of the states and a Commission member. The European Council is to meet at least twice a year under the chairmanship of the head of state or government of the state that holds the Council's rotating presidency.[732] The European Council must report to the European Parliament annually and after each of its meetings.[733]

The remaining references to the European Council in the TEU relate to the EU's Second and Third Pillar. Article 13 requires the group to define principles, guidelines and common strategies in the Second Pillar, the common foreign and security policy (CFSP).[734] Article 17 assigns the European Council the task agreeing on a "common defence" should it so desire. The only reference to voting on the European Council is found in TEU Article 23 which requires the Council to act unanimously in decisions with respect to the CFSP, but also permits the Council to refer decisions to the European Council "for decision by unanimity." The final mention of the European Council in the TEU is in the Third Pillar section, relating to police and judicial cooperation in criminal matters.[735] TEU Article 40a calls for a Council decision on programmes of enhanced cooperation within the Third Pillar, but permits any member of the Council to have the matter referred to the European Council, presumably for consultation only, because the article notes that the Council will nevertheless be responsible to act on the proposal.[736]

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[729] Single European Act, supra note 118.
[730] See EC Treaty arts. 11, 99, 113, 128.
[731] See TEU arts. 4, 13, 17, 23, 40a.
[732] TEU art. 4. See also EC Treaty art. 203 (describing the rotating Council presidency).
[733] TEU art. 4.
[734] See TEU arts. 11-28 (provisions on the CFSP).
[735] See TEU arts. 29-42 (provisions on the Third Pillar).
[736] See also TEU arts. 43-45 (provisions on implementing enhanced cooperation).

Since there is no mention of the European Council in the extensive institutional section comprising Part Five of the EC Treaty,[737] the treaty's few references seem almost random. Article 11(2) mentions the possibility of a reference from the Council to the European Council in cases of proposed enhanced cooperation, on the same terms as in TEU Article 40a. In the matter of economic and monetary union, EC Treaty Article 99 calls for the European Council to receive reports from the Council and then "discuss a conclusion on the broad guidelines of the economic policies of the Member States and of the Community." Similarly, Article 113 entitles the European Council to receive annual reports from the European Central Bank. In the matter of employment in the Community, EC Treaty Article 128 calls for the European Council to receive reports from the Council and Commission,[738] and the European Council is expected to "adopt conclusions" on the employment situation.[739]

By virtue of the stature of its voting members, the European Council under the Constitution would have maintained and might even have expanded its role in representing the supreme executive and legislative authority within the European Union.[740] It is noteworthy that in the Constitution the European Council is formally recognised as an EU institution for the first time, and its functions and responsibilities are spelled out more concretely than in the Treaties. The Constitution describes many instances in which the European Council will make policy decisions, and even if it must refrain from legislating in the technical sense, this institution certainly possesses the political power to instruct the Council on legislative matters. The Constitution's statement that the European Council sets policy but does not legislate is an apparent attempt to reduce confusion as to the differences between the competences of the Council of Ministers and those of the European Council. Another important clarification is the Constitution's specification that decisions on the European Council are normally to be taken by consensus.

Among the changes proposed for the European Council, it is the new office of the President that represents the most significant development, and it offers new evidence of the state-like nature of the Union. No longer would the

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[737] EC Treaty arts. 189-280.
[738] EC Treaty art. 128(4).
[739] EC Treaty art. 128(1).
[740] For a review of the increasing importance of the European Council, see Jan Werts, The Unstoppable Advance of the European Council, in The EU Constitution: The Best Way Forward? (Deirdre Curtin, Alfred E. Kellermann & Steven Blockmans, eds., 2005).

President be the elected leader of a Member State government, and no longer would the President's term of office be based upon the six-month rotating Council presidency. Under the Constitution the President could not hold a national mandate and would serve a two and one-half year term, renewable once. The elimination of the national mandate coincides with the Constitution's job description for the new Union Minister for Foreign Affairs. The Minister, who would chair the Council's foreign affairs formation, would not be the foreign affairs minister from the Member State holding the Council's rotating presidency, but would be separately appointed by the European Council.[741]

Internally and externally the new European Council President would offer a more recognisable and consistent leadership presence than is offered by the Treaties' rotating presidency. However, this office has the potential to usurp the position of the Commission President (and even the Union Minister for Foreign Affairs) as the day-to-day face of the Union. Would this necessarily be a positive development? Jürgen Schwarze is sceptical:

> First, how much weight will the word of the President of the [European] Council have, and what will his position be among the Member States' Heads of State or Government? Second, who will be willing to accept this position, if the President of the [European] Council cannot occupy a position in the Member States simultaneously? Besides these issues, there may be some tension between the President of the [European] Council and the President of the Commission, but also between the President of the [European] Council and the – also new – Union Minister for Foreign Affairs. This possibility arises especially with regard to the Union's foreign and security policy.[742]

In the same vein, Michael Dougan warns that the European Council President, especially if he or she is supported by a permanent professional staff, "could create a competing centre of executive power which might undermine the influence of the Commission, or at least create inefficiencies by setting the two institutions against each other."[743] Juliane Kokott and Alexandra Ruth suggest that the new President should "avoid conflicts by exercising his/her duties in the spirit of the political compromise that led to the creation of the post and by meticulously respecting the division of responsibilities within the

[741] Constitution art. I-28.
[742] Jürgen Schwarze, The Convention's Draft Treaty Establishing a Constitution for Europe, 40 C.M.L.R. 1037, 1039 (2003).
[743] Dougan, supra note 358, at 775.

institutional system without encroaching on the role of the Commission's President, the Foreign Minister or even the Council."[744]

2.2 Members of the European Council represent the Governments of the Member States

There are few textual references in the Constitution that connect the European Council to the Member States, but few are really needed. Constitution Article I-20 states the obvious, namely, that the members of the European Council are the heads of state or government of the Member States (assisted by a redefined President, the Commission President and the new Union Minister for Foreign Affairs). Because the voting representatives on the European Council are chief officials of their nations, each member of this body will be expected to promote and protect the interests of his or her nation.[745] This is in stark contrast to other EU institutions such as the Commission, Court of Justice and European Central Bank, whose members have always been required to act independently and without regard to any national consideration.[746] It is fair to say that when the European Council meets, it looks less like an EU institution than like an international summit meeting. Reinforcing the dominating presence of the Member States on the European Council is the fact that the default voting rule for decisions of this group is consensus, thus ensuring that the government of each Member State must be in accord with any steps taken to set broad policies for the Union.[747]

The qualities described above are also a legitimate way to characterise the European Council its current embodiment under the Treaties. In fact, the European Council today looks even less like an EU institution than an intergovernmental gathering. The Constitution's new institutional references might be seen as a helpful emphasis on this body's function as an EU organ, but the fact that all its decisions must be taken by consensus acts as a constant reminder of the power of each Member State. Despite the Constitution's changes, the European Council would remain a voice for the

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[744] Kokott & Ruth, supra note 116, at 1338.

[745] Interestingly, the Constitution mentions that members of the Council are to be ministerial level officials of each Member State who "may commit the government of the Member State in question and cast its vote." Constitution art. I-24(2) (emphasis supplied). These words are not used in reference to the European Council, but each of its members, as a head of state or government, is to an even greater degree expected by his or her constituents to represent the interests of the state and cast votes on behalf of the state's elected government.

[746] Constitution arts. I-26(7), I-29(2), I-30(3).

[747] Constitution art. I-21(4).

governments of the Member States in the most critical areas of EU policy and development. The elected government of each state would be in accord with each broad policy decision. Failing that, the European Council would be unable to act.

3. COUNCIL OF MINISTERS

3.1 **A legislature and executive**

The Council of Ministers (Council) is introduced in Articles I-23 to I-25 of the Constitution and further elaborated in Articles III-342 to III-346. Article I-23(1) provides that the Council serves as a legislative chamber of the EU, and it must enact legislation jointly with the European Parliament.[748] It also serves as the Union's executive body, to exercise the budgetary function and "carry out policy-making and coordinating functions."[749] Although the Council may not itself initiate legislation, Article III-345 permits it to request the Commission to do so, and the Commission must either comply or explain its inaction. Articles III-395 to III-415 describe the Council's pivotal role in passing EU legislation and in approving the Union budget.

According to Constitution Article I-24(1), the Council must meet in various "configurations," depending on the subject under consideration, and in each configuration it is composed of one ministerial level representative from each Member State.[750] As provided in a Draft Decision of the European Council, the presidencies of all Council configurations other than Foreign Affairs are to be shared by groups of three States, serving collectively for 18 months, which each state holding the all of the presidencies for six months during the 18-month term.[751] The groups are to be assigned on the basis of "equal rotation among the Member States, taking into account their diversity and geographical balance within the Union."[752]

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[748] Further details on the Council are presented in Part III of the Constitution. Constitution arts. III-342 to III-346.

[749] Constitution art. I-23(1).

[750] Constitution art. I-23(2). The Union Minister for Foreign Affairs is an additional member of the Council, and he or she will chair the Foreign Affairs configuration. Constitution art. I-28(3). Another example of a configuration is General Affairs, which is mandated in Article I-24(2) to "prepare and ensure follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission."

[751] Draft Decision, supra note 164. See Constitution art. I-24(6), which mandates the European Council's decision.

[752] Draft Decision, supra note 164, art. 1.

Article I-24(6) requires the Council to meet in public "when it deliberates and votes on a draft legislative act," although not when dealing with non-legislative activities. Article III-343(1) permits a Council member to accept a proxy from one other member. Article III-344 provides that the Council is to be assisted by a full time administrative staff, including a Committee of Permanent Representatives (COREPER) and a General Secretariat.[753]

The ordinary decisional requirement for the Council, set forth in Constitution Article I-23(3), is that it will act on the basis of a qualified majority vote (QMV). The original voting scheme proposed for the Constitution by the Convention was that a qualified majority would consist of a majority of the Member States representing three-fifths of the EU's population, but this formula was rejected at the IGC meetings that took place in December, 2003, and approval of the Constitution was postponed.[754] The chief problem was that Spain and Poland wished to protect the favorable weighting of their Council votes as assigned to them in the Treaty of Nice, and the proposed QMV percentage formulas negated the special advantage they had come to expect.[755] The Irish Presidency invested a great deal of energy in solving the problem, and the result was a revised voting scheme that somewhat increased the percentages necessary to achieve a qualified majority, to 55 percent of the Member States and 65 percent of the EU population.[756] According to a protocol to the Constitution, this formula would take effect in 2009.[757] (Under the Reform Treaty this would officially be deferred until 2014, although special requests by any member of the Council could effectively postpone application of the formula until 2017.[758])

The Council is mentioned throughout the TEU with respect to its involvement in a variety of Union programmes and processes. The only TEU

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[753] For a detailed analysis of COREPER, see Jaap W. de Zwaan, The Permanent Representatives Committee: Its role in the decision-making of the European Union (T.M.C. Asser Institute – The Hague, Elsevier - North Holland 1995).
[754] Fuller, supra note 108.
[755] Id. For an extensive historical review of QMV formulas and an assessment of the positions of Spain and Poland under the Nice Treaty, see Edward Best, What is Really at Stake in the Debate over Votes? 2004/1 Eipascope 14, available at http://www.eipa.nl/cms/repository/eipascope/Art_2(2).pdf.
[756] Constitution art. I-25(1).
[757] Protocol on the transitional provisions relating to the institutions and bodies of the Union, Dec. 16, 2004, O.J. (C 310) 382, art. 2(1).
[758] Draft IGC Mandate, supra note 20, at 18, art. 13.

provisions of a structural nature are Article 3, which refers to a "single institutional framework" for the Union, and Article 5, which lists the five primary Union institutions, including the Parliament, Council, Commission, Court of Justice and Court of Auditors.

As in the TEU, the EC Treaty refers to the Council numerous times with regard to Union programmes and processes, but the present focus is on sections that describe the Council's structure and general competences, and the EC Treaty contains these important details. To begin, Article 7 of the EC Treaty lists the same five institutions and refers to the two advisory committees of the Community.[759] Thereafter, Articles 202 to 210 add to the detail regarding the Council. Article 202 describes the Council as having the power to "ensure coordination" of Member State economic policies, "take decisions," confer implementation powers on the Commission and "exercise directly implementing powers itself."

Interestingly, the wording of EC Treaty Article 202 about the Council's right to "directly exercise implementing powers itself" – a phrase that helps define the Council as an executive as well as a legislative body – was not carried over into the Constitution's institutional sections. Article I-23(1) of the Constitution merely states that the Council "shall carry out policy-making and coordinating functions as laid down in the Constitution." However, where the Constitution generally addresses "the exercise of Union competence," Article I-37 provides:

> Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Article I-40 [the common foreign and security policy], on the Council."

A further indication that the Council would retain the right of direct implementation may be found in the Comitology Decision of 1999. It describes the various ways in which the Commission's implementing powers are to be carried out, and it explicitly refers to the Council's right in new legislation to reserve implementation for itself.[760] This Decision would have remained in effect under the Constitution as part of the *acquis* of the Union.

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[759] The advisory committees are the Economic and Social Committee and the Committee of the Regions.

[760] Council Decision of 28 June 1999 (1999/486/EC) laying down the procedures for the exercise of implementing powers conferred on the Commission, July 7, 1999, O.J.

EC Treaty Article 203 describes representation on the Council and the system of rotating Presidencies, while Article 204 sets the terms for convening of Council meetings. Article 207 describes the offices that assist the Council, namely, COREPER and the General Secretariat. Article 208 allows the Council to request the Commission to initiate legislation, although without the Constitution's requirement that the Commission must give reasons if it declines.[761] Article 209 permits the Council to set rules for the Community's advisory committees. Last, Article 210 grants the Council the authority to set salaries and benefits for members of the Commission, Court of Justice and Court of First Instance.

The critical matter of voting on the Council is covered in EC Treaty Article 205, which has several parts. First, Article 205(1) provides for Council decisions to be taken by "a majority of its Members" unless the Treaty provides otherwise. Second, Article 205(2) lists the population-weighted votes assigned to each Member State in qualified majority voting situations, and provides that 62 votes are required in all cases in which a matter has been proposed by the Commission. Third, Article 205(2) also requires 62 votes, but from at least 10 Member States, "in other cases." Finally, Article 205(3) provides that abstentions will not prevent a unanimous vote being taken, if such is required. Also in connection with voting, Article 206 notes that a Council member may accept a voting proxy from one other member.

EC Treaty Articles 249 to 254 describe in detail the creation of EU legislation and regulations, including the Council's critical role in the various processes. Likewise Articles 268 to 280 describe budgeting and fiscal procedures for the Community, again highlighting the Council's key participation in these processes.

The Constitution proposes several significant changes relating to the Council: The most controversial has been the Constitution's new formula for qualified majority voting, which is a double calculation based on percentages of the Member States and percentages of their populations. This approach would have replaced the system under the Treaties that bases a qualified majority on a fixed number of votes allocated to each state. The treaty allocation of votes is population-based, but less fluid than the Constitution's approach. The second development is the Constitution's requirement for the Council to meet in public when legislating. Third is the fact that the new

(L 184) 23, art. 1. The 1999 Decision has been amended by the Council Decision of July 17, 2006 (2006/512/EC), O.J. (L 200) 11.

[761] Constitution art. III-345.

Union Minister for Foreign Affairs would preside over the Foreign Affairs Council formation in lieu of a national representative serving in rotation. He or she would also serve as foreign affairs vice-chair of the Commission.[762] A fourth and less dramatic development is a change to the Council's system of rotating presidencies. The semiannual hand-off of the Council Presidency is restructured somewhat from the EC Treaty. The treaty describes the Presidency as being "held in turn by each Member State,"[763] while the Constitution states that for periods of 18 months the Presidency will shared by three Member States, with each of them holding the presidencies of each configuration during six months of that period. Beyond these structural and procedural changes, certain areas in which the Treaties require unanimous Council decisions are changed in the Constitution to a qualified majority vote. These matters are analysed in Chapter 15 of this treatise.

Qualified majority voting is, by definition, a majoritarian procedure that on one hand resembles the democratic process within a typical nation state and on the other hand undercuts the autonomy of the Member States in the European Union.[764] Under the Constitution's version of QMV no single Member State would have had the ability to block EU legislation. Likewise, because more 55 percent of the Member States would be represented in a prevailing vote under the Constitution's QMV formula, no small group of the largest Member States would have been able to dictate decisions. However, because of the requirement that 65 per cent of the EU population be represented, a small group of the largest States would have been able to prevent a successful vote, although the Constitution requires at least four States to form a "blocking minority."[765] Giovanni Grevi has observed that the requirement of four States to form a blocking minority would "prevent

[762] Juliane Kokott and Alexandra Ruth have commented that "this Foreign Minister, depending on the field, will continue to act according to different procedures. Only when exercising the responsibilities regarding current first pillar matters will he/she follow the regular Commission procedures. In contrast, within the ambit of CFSP, he/she will act 'as mandated by the Council'. This is all the more problematic as the role the Commission enjoyed so far with regard to CFSP will be taken over by the Foreign Minister. Actual practice will prove whether the inherent dangers to this functional merger without a substantive harmonization will manifest themselves, or whether the aim of enhancing efficiency and overall coherence will be realized." Kokott & Ruth, supra note 116, at 1327.

[763] EC Treaty art. 203.

[764] For a detailed analysis of QMV formulas and suggestions for alternative allocations of voting power, see Bela Plechanovová, Draft Constitution and the Decision-Making Rule for the Council of Ministers of the EU – Looking for an Alternative Solution (Eur. Integration Online Papers, Working Paper No. 12, 2004).

[765] Constitution art. I-25(1).

Germany, the UK, France or Italy from forming a blocking coalition of three."[766] Interestingly, a draft Council decision would have required that for a 5-year period from 2009 to 2014 the Council would be required to reconsider any measure if requested by Member States with three-fourths of the population or three-fourths of the number of States necessary to form a blocking minority.[767] This measure may be seen a means of temporarily limiting the dilution of the large states' power as a result of the EU accessions in 2004 and 2007.

The Constitution requires the Council to meet in public when it "deliberates and votes on a draft legislative act," but not when it considers "non-legislative activities."[768] It is interesting that no open-meeting requirement is imposed on the European Council, and the Constitution's admonition that the European Council "shall not exercise legislative functions"[769] appears to be designed in part to justify insulating its activities from public scrutiny. Nevertheless, by requiring the Council to conduct its legislative business in public, the Convention and the IGC offered a response to public demands for more EU transparency and to the Commission's White Paper challenge to take concrete steps to boost public confidence in the

[766] Grevi, supra note 402, at 8. For a detailed analysis of the various majority and blocking formulas possible under the Constitution and its predecessors, see Janis A. Emmanouilidis, Historically Unique, Unfinished in Detail – An Evaluation of the Constitution, Centre for Applied Policy Research, 2004/3 EU Reform 5-8, 12-13. For an earlier review of coalition-forming and negotiations that have led to QMV decisions on the Council, see Madeleine O. Hosli, Coalitions and Power: Effects of Qualified Majority Voting in the Council of the European Union, 34 J. Common Mkt. Stud. 255 (1996).

[767] Draft Council Decision relating to the implementation of Article I-25 [previously Article I-24], Dec. 16, 2004, O.J. (C 310) 421, art. 1. The editors of the Common Market Law Review have described the "blocking clause" as follows: "Finally, in order to reach agreement, the Ioannina compromise was reintroduced. If three-quarters of the States or of the population necessary to form a blocking minority so request, the adoption of the measure is suspended for a reasonable period in order to find a satisfactory solution. This suspension cannot result in the postponing of deadlines provided for in the Constitution (e.g. co-decision cases) or in other rules (provisions in the rules of procedure which allow a majority of States to call for a vote). The Ioannina compromise was rarely used in practice, so one can hope it will be the same in this case." Editorial Comments, supra note 305, at 905.

[768] Constitution art. I-24(6). Note that in response to the difficulties in the process of ratifying the Constitution, the European Council in June 2006 chose to implement this reform on its own initiative (and under its general authority under the Treaties), rather than to wait for the Constitution to take effect. See note 8 supra and accompanying text.

[769] Constitution art. I-21(1).

Union. However the effectiveness of an open-meeting requirement is questionable. A Council desiring secrecy could easily declare a "non-legislative" session and conduct its deliberations behind closed doors. Its members could also conduct extensive, but informal discussions in corridors or other venues away from the Council chamber. Such tactics would undermine the Constitution's spirit of openness.

The change in the system of rotating the Council presidencies is arguably a modest change from the present form of cooperation, in which the current Presidency may informally receive assistance and coordination from the Member States representing the immediately preceding Presidency and the one to follow.[770] Whether joint coordination and cooperation among the same three Member States for an 18-month period would result in more operating and policy consistency remains to be seen. It might be argued that the disruption caused by a complete replacement of the Presidency team every year and a half would be greater than that caused by informally adding and removing a cooperating member every six months. However, even under the Constitution's proposed system it should be expected that out-going and incoming Presidencies would be available for consultation. Furthermore, under the Constitution the Union Minister for Foreign Affairs would be in a position to provide continuity in the face of Council Presidency rotations,[771] and COREPER would remain fully active in providing ongoing bureaucratic support for the Council.

3.2 **The Council serves as an additional voice for the states**

There is little question that members of the Council, like their counterparts on the European Council, are expected to represent the separate

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[770] In the area of the common foreign and security policy, the cooperative arrangement has been referred to as a "troika," although Article 18(4) of the TEU says only that the current Council Presidency "shall be assisted in these tasks if need be by the next Member State to hold the Presidency."

[771] Jürgen Schwarze has commented: "Notwithstanding all the difficulties, the creation of the position of Union Minister for Foreign Affairs is a sound decision. Yet, from an idealistic point of view, the improvements in the field of foreign and security policy remain unsatisfactory. With the principle of unanimity still in effect, the strength of Europe's foreign policy will remain rather limited. Realistically, the claim for national sovereignty, especially in the field of foreign policy, seems difficult to overcome in the near future. The office of the Union Minister for Foreign Affairs and the proposed solution of a 'double hat' both reflect the current situation with regard to the different positions on foreign policy existing in the Member States. At the moment, a greater extent of common policy in this field does not seem achievable. Schwarze, supra note 742, at 1040.

interests of the Member States. In fact, Article I-23(2) of the Constitution speaks of them as having the authority to "commit the government of the Member State in question and cast its vote." Also, as suggested in the previous section, the influence of each state is to some extent protected by the "equal rotation" language of Article I-24(7): "The Presidency of Council configurations, other than that of Foreign Affairs [which is chaired by the Union Minister for Foreign Affairs], shall be held by Member State representatives in the Council on the basis of equal rotation," with the system of rotation to be determined by a qualified majority decision of the European Council.

The primary changes relating to the Council, as described in the preceding section (the new QMV formula, the open-meeting requirement, the new Union Minister for Foreign Affairs, and the new Presidency rotation scheme) would not appreciably affect the influence of the Member States within the Council. The change in QMV formulas might impact the individual influence of Spain and Poland, but in general the Constitution's new approach preserves the existing majoritarian approach to Council action. It is uncertain whether the requirement for open meetings would cause Council members to act in a more collegial, EU-focused manner than they might have in private. Except in foreign affairs, the new system of Presidency rotation would not likely have dramatic impact. Overall, the Member States would not gain or lose essential power as a result of the Constitution's structural changes to the Council. The impact of any movement from unanimous Council voting to QMV in matters of substance will be addressed in Chapter 15.

4. EUROPEAN COMMISSION

4.1 **The central and essential Union institution**

The Commission acts as the permanent executive and chief administrative body of the European Union. It is described in Part I of the Constitution in Articles I-26 to I-28,[772] with more detail provided in Part III, Articles III-347 to III-352.[773] Article I-26(1) broadly describes the

[772] Article I-26 is the basic description of the Commission, with Articles I-27 and I-28 respectively describing the Commission President and the Union Minister for Foreign Affairs, who is a vice-president of the Commission. The conditions of employment of the Commission President, the Minister and the Commissioners are to be determined by a European regulation adopted by the Council. Constitution art. III-400(1)(a).

[773] The conditions of employment of the Commission President and the Commissioners are to be determined by a European regulation adopted by the Council. Constitution art. III-400(1)(b).

Commission's responsibilities as (1) carrying out "coordinating, executive and management functions," (2) acting as the promoter of "the general interest of the Union," and (3) preserving the EU by ensuring "the application of the Constitution, and measures adopted by institutions pursuant to the Constitution." Article I-26(1) appoints the Commission as manager of the EU budget and programmes, and it further assigns it the task of enforcing EU law by overseeing "the application of Union law under the control of the Court of Justice." Article III-360 provides that its enforcement responsibilities extend even to the Member States.

The Commission has the primary role in proposing new EU legislation, and Article I-26(2) states that "Union legislative acts may be adopted only on the basis of a Commission proposal, except where the Constitution provides otherwise." Article I-34(3) expands on the exceptions by referring to instances in which EU legislation may be adopted "at the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank." Examples of the exceptions are given in the conclusion of this discussion. The Commission's power to initiate legislation is bolstered by Article III-395(1), which states that except in specified cases the Council may amend a Commission proposal only by acting unanimously, and by Article III-395(2), which permits the Commission to amend proposed legislation at any time prior to its adoption.[774] Furthermore, under Article III-396(9) if the Commission delivers a "negative opinion" on an amendment proposed by the European Parliament, a unanimous vote of the Council is required to approve such an amendment.[775]

Article I-26(7) requires the Commission to be independent at all times, and its members may not "seek nor take instructions from any government or other institution, body, office or agency." Member States are required to respect the Commissioners' independence and "not seek to influence them in the performance of their tasks."[776] The Commission is, however, answerable to the European Parliament, which may censure the Commission and force its resignation.[777]

The Constitution provides for eventual and certain reduction in the size of the Commission. According to Article I-26(6), after the first full

[774] As noted below, these constitutional provisions have their antecedents in EC Treaty Article 250(1) and (2).
[775] The treaty counterpart to Article III-396(9) is EC Treaty Article 251(3).
[776] Constitution art. III-347.
[777] Constitution art. I-26(8).

Commission term after the effective date of the Constitution the Commission will have a composition equal to two-thirds of the number of Member States, including its President and the Union Minister for Foreign Affairs – each of whom (except for the Union Minister) will serve a five-year term.[778] A unanimous vote of the European Council will be required to change the size of the Commission and also to determine its rotation, but representation is to be assigned with demographic and geographical diversity in mind and on the basis of a strictly enforced "equal rotation between the Member States."[779] As described below, the EC Treaty generally provides for one Commissioner per Member State, with the prospect of an unspecified reduction in number of members when the EU has 27 Member States.[780]

In keeping with the Commission's status as a central organ of the EU, members of the Commission, its President and the Union Minister for Foreign Affairs are appointed by other EU institutions. Under Constitution Article I-27(1) the President is nominated by a qualified majority vote of the European Council and elected by the European Parliament. Under Article I-28(1) the European Council, with the consent of the President-elect, also "appoints" the Union Minister for Foreign Affairs by qualified majority vote. After election of the President-elect, Article I-27(2) provides that each of the Member States to be represented on the Commission then "suggests" its candidate to the Council and President-elect, who by common accord then adopt the list of candidates. The entire slate of President, Foreign Affairs Minister and Commissioners is then submitted for approval by the Parliament and is thereafter appointed by a QMV decision of the European Council.[781]

Once the Commission is approved, Constitution Articles I-27(3) and III-350 empower the President to determine its internal organisation, while the Commission adopts its own rules of procedure.[782] Commission decisions are taken by majority vote.[783]

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[778] Constitution art. I-26(3), A Commissioner must resign if so requested by the Commission President, or upon the order of the Court of Justice. Constitution arts. I-27(3), III-349. A replacement of the same nationality will be selected in the same fashion as the original appointment. Constitution art. III-348(2). The Union Minister for Foreign Affairs will serve at the pleasure of the European Council. Constitution art. I-28(1).
[779] Constitution art. I-26(6).
[780] EC Treaty art. 213.
[781] Constitution art. I-27(2).
[782], Constitution art. III-352.
[783] Constitution art. III-351.

In the Treaties the Commission is identified in Article 5 of the TEU and in Article 7(1) of the EC Treaty as one of the primary EU institutions. The institutional detail is found in EC Treaty Articles 211 to 219. The Commission's general mandate in Article 7 is similar to that in Constitution Article I-26, although the treaty mentions "the proper functioning and development of the common market,"[784] rather than the "general interest of the Union."[785] EC Treaty Article 7 makes the Commission the guardian of the treaty by calling on it to "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied." Article 211 adds that the Commission must "exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter."

The EC Treaty does not state that the Commission alone may initiate legislation. However, Article 211 mandates the Commission to "participate in the shaping of measures taken by the Council and the European Parliament," and the two primary forms of legislative procedure, co-decision under Article 251 and cooperation under Article 252, are initiated only upon the Commission's submission of a proposal.[786] The Commission's right of initiative is further strengthened by Article 250, which requires a unanimous vote of the Council of Ministers to amend a Commission proposal[787] and which permits the Council to amend proposed legislation "at any time during the procedures leading to the adoption of a Community act."[788] In addition, Article 251(3) requires a unanimous Council vote to approve a Parliament-proposed legislative amendment, if the Commission has delivered a "negative opinion" on the amendment.

Article 274 calls on the Commission to "implement the budget," and the Commission has a prominent role throughout the entire budgeting process under the treaty.[789] Regarding enforcement powers, Article 226 permits the Commission to take steps against a Member State that has "failed to fulfil an obligation" under the treaty.

EC Treaty Article 213(2) requires the Commission to be independent at all times, and its members may not "seek nor take instructions from any government or other body." Member States are required to respect the Commissioners' independence and "not seek to influence the Members of the

[784] EC Treaty art. 211.
[785] Constitution art. I-26(1).
[786] EC Treaty arts. 251(2), 252(a).
[787] EC Treaty art. 250(1).
[788] EC Treaty art. 250(2).
[789] EC Treaty arts. 268 to 280.

Commission in the performance of their tasks." The Commission is, however, answerable under Article 201 to the European Parliament, which may censure the Commission and force its resignation.

Under Article 213(1) of the EC Treaty, the 15-member Union appoints a 20-member Commission, with two Commissioners for each of the five largest Member States, but with the number of Commissioners changing to one per Member State after the 2004 enlargement to 25 Member States.[790] Pursuant to the Protocol on Enlargement, upon expansion of the EU to 27 states (which occurred in January of 2007) the Commission should be reduced to less than one Commissioner per Member State, with the actual number to be set by a unanimous Council vote, and with the rotation to be unanimously agreed, subject to the "principle of equality."[791] As of the writing of this treatise, the reduction has not yet been achieved, and the Commission had expanded to 27 members.

EC Treaty Article 214(2) provides that the Commission President is nominated by the Council, meeting in the composition of heads of state or government, and then approved by the European Parliament. The Council and President-nominee by "common accord" then "adopt the list" of Commissioners on the basis of candidates proposed by the Member States. The Parliament must then approve the slate, after which the Council "appoints" the Commission. The term is five years.[792] Once the Commission is approved, EC Treaty Article 217 empowers the President to determine its internal organisation, while the Commission adopts its own rules of procedure.[793] Commission decisions are taken by majority vote.[794]

Overall, the following developments in the Constitution with respect to the Commission are noteworthy:

> --The Commission's eventual reduction in size has been controversial, even though the EC Treaty already contemplates some measure of reduction after the EU reaches 27 Member States. The paring down under the Constitution will undoubtedly increase the

[790] Protocol on Enlargement, supra note 376, art. 4(1).
[791] Id. at art. 4(2), (3).
[792] EC Treaty art. 214(1). A Commissioner must resign if so requested by the Commission President, or upon the order of the Court of Justice. EC Treaty arts. 217(4), 216. A replacement will be selected by the Council. EC Treaty art. 215.
[793] EC Treaty art. 218.
[794] EC Treaty art. 219.

Commission's operating efficiency, but its political outreach within the "unrepresented" Member States may be undermined.

--The new Union Minister for Foreign Affairs would both preside over the Foreign Affairs formation of the Council and serve as a vice-president of the Commission.[795] This would undoubtedly create confusion from time to time as to which hat the Minister is wearing at any given moment, and to whom he or she is answerable.

--The Constitution transfers from the Council to the European Council the unanimous decisions as to the Commission's eventual size and its system of rotation. Fortunately, this seems unlikely to cause any procedural difficulties or political challenges.

--In the matter of legislative initiative, the Constitution both adds and detracts. In the area of freedom, security and justice, Article III-264 of the Constitution identifies matters on which one-fourth of the Member States may initiate legislation. The counterpart provisions in Articles 34(2) and 42 of the TEU permit a single state to initiate the legislative process.[796] Arguably, this change would reduce Member State authority and correspondingly strengthen the Commission. On the other hand, the unprecedented right of citizen initiative under Article I-47(4) of the Constitution would serve as a potential challenge to the Commission's legislative competence.

Despite these changes, under the Constitution the Commission and its basic competences are essentially carried over from the Treaties.[797] Through its independence and its means of functioning the Commission remains the embodiment of the "Community method" – a distinct contrast with the

[795] Constitution art. I-28(3), (4).

[796] Under Title IV of Part Three of the EC Treaty, during a 5-year transitional period expiring on May 1, 2004, a single Member State was permitted to initiate legislation on matters of visas, asylum, immigration and other related policies. EC Treaty art. 67(1).

[797] For a review of the development of the Commission, see Michel Petite and Clemens Ladenburger, The Evolution in the Role and Powers of the European Commission, in The EU Constitution: The Best Way Forward? (Deirdre Curtin, Alfred E. Kellermann & Steven Blockmans, eds., 2005).

intergovernmental approach that prevails in the Council and European Council.[798]

4.2 The Member States have limited influence over the Commission

In general, both the Constitution and the Treaties create institutional separation between the Member States and the Commission. Under the Constitution the only Commission-related matters subject to a national veto are (1) the requirement of a unanimous European Council decision to change the size of the Commission after it has been reduced in size commencing in 2014,[799] (2) the consensus voting requirement for the European Council to determine the Commission's rotation after 2014,[800] (3) the need for a unanimous Council decision not to fill a vacant Commission seat,[801] and (4) the requirement of a unanimous Council decision to amend or approve amendments to certain legislative proposals from the Commission.[802] Furthermore, each Member State possesses the exclusive right to name its candidate for a seat on the Commission.[803]

The Constitution's provisions generally mirror those of the EC Treaty. The Treaty's Protocol on Enlargement contains the requirement of a unanimous Council decision to determine the size of the Commission after the EU reaches 27 Member States, as well as the consensus voting requirement for the Council to determine the Commission's rotation after the Commission has been reduced in size.[804] The Constitution maintains the consensus requirement, although it moves the decision from the Council to the European Council. EC Treaty Article 215 contains the requirement for a unanimous Council decision not to fill a vacant Commission seat, while Articles 250(1) and 251(3) express the requirement of a unanimous Council decision to amend or approve amendments to certain legislative proposals from the Commission. Last, Article 214(2) creates each Member State's exclusive right to name its candidate for a seat on the Commission.

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[798] For a comparison of the Community method with alternative means for managing the European Union, along with an analysis of the value of the Commission to the ongoing success of the EU project, see Lang, supra note 715.
[799] Constitution art. I-26(6).
[800] Constitution art. I-26(6).
[801] Constitution art. III-348(2).
[802] Constitution art. III-395(1), III-396(9). Treaty counterparts are EC Treaty Articles 250(1) and 251(3).
[803] Constitution art. I-27(2).
[804] Protocol on Enlargement, supra note 376, art. 4(3).

The prospect of reducing the size of the Commission raised concerns,[805] with many of the smaller Member States protesting that they need to be represented on the Commission at all times to maintain a better link between their people and the operations of the EU. Although the Commission must act completely independent of Member State influence, a seat on the Commission carries with it an emotional appeal and a special means of communicating developments in Brussels back to the "represented" Member State. Thus, the eventual temporary loss of representation may represent a further separation of this EU institution from the states and their citizens.

5. EUROPEAN COURT OF JUSTICE

5.1 **Expanded jurisdiction for the Court**

The European Court of Justice is identified as an EU institution in Article I-19(1) of the Constitution and is generally introduced in Article I-29. The Court and its institutional system, jurisdiction and activities are further described in Part III, Articles III-353 to III-381.[806] The Court is granted certain power over the Member States, in that Articles III-360 and III-361 permit it to hear cases brought against a Member State respectively by the Commission or another Member State where the ground for action is that the accused State "has failed to fulfil an obligation under the Constitution." Article III-362 permits the court to issue judgments requiring the defendant State to comply with a Court decision, or, failing that, to pay a "lump sum or penalty payment."[807]

In the TEU the Court is listed among the primary EU institutions in Article 5, and the treaty also contains numerous references to the scope and limitation of the Court's jurisdiction.[808] However, the primary institutional descriptions are found in the EC Treaty. Article 7 of the EC Treaty lists the Court among the primary EU institutions, and Articles 220 to 245 provide much more detail. Under the EC Treaty the Court is granted the authority to hear cases brought against a Member State by the Commission, under Article 226, or by another Member State, under Article 227, where the ground for

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[805] European Commission, Eurobarometer 59: Public Opinion in the European Union (Eur. Opinion Res. Group, June 2003), at 10-11, 32. See also Conference of the Representatives of the Governments of the Member States, Presidency Note, Brussels, 11 December 2003, CIG 60/03 ADD 2.

[806] The conditions of employment of the Court's members are to be determined by a European regulation adopted by the Council. Constitution art. III-400(1)(a).

[807] Constitution art. III-362(1), (2).

[808] See, e.g. TEU art. 46.

action is that the accused State "has failed to fulfil an obligation under this Treaty." Although Article 227 actions are rare, "infringement actions" under Article 226 are regularly brought by the Commission. Article 228 adds significant coercive power to judgments of the Court by permitting it to require a defendant State to comply with a Court decision, or, failing that, to pay a "lump sum or penalty payment."

Article III-353 of the Constitution describes the Court as a body that can sit as a Grand Chamber or as the full Court. In addition to the Court itself, Article III-356 perpetuates the lower court, whose name will be changed from the Court of First Instance to the General Court. Normally, decisions of the General Court can be appealed to the Court of Justice on points of law only.[809] A third level of court is described in Article III-359 as "specialised courts," that may be created by European laws to hear certain types of cases. Appeals from the specialised courts will go to the General Court on points of law only, or on points of fact and law, depending on the mandate in the relevant European law that establishes the specialised court. The constitutional arrangement mirrors that of the EC Treaty. Three levels of court are provided in Articles 220 and 225a. Under Article 221 the Court may sit as a full court or in chambers, and Articles 225 and 225a provide for appeals in a similar fashion to the appeals processes described in the Constitution.

Under the Treaties the Court has been an institution that is both central to the operations of the EU and independent of the other Union institutions. In carrying out its work the Court is also independent of the governments and courts of the Member States. The Constitution does not tamper with these basic characteristics of the Court, nor does it generally alter the Court's basic competences and procedures. However, several developments are of interest.

The Constitution extends the Court's jurisdiction into the controversial area of the common foreign and security policy (CFSP), which generally corresponds with the Second Pillar under the TEU.[810] As a general matter Article III-376 states that the Court shall have no jurisdiction with respect to Article I-40 (the common foreign and security policy) or I-42 (the common security and defence policy). Likewise, there will be no jurisdiction under Article III-293 (the EU's external action) to the extent it relates to the

[809] Constitution art. III-358(1).

[810] For a discussion on the Constitution's impact on the Court's jurisdiction, see Ad Geelhoed, The Expanding Jurisdiction of the EU Court of Justice, in The EU Constitution: The Best Way Forward? (Deirdre Curtin, Alfred E. Kellermann & Steven Blockmans, eds., 2005).

CFSP. These provisions are consistent with TEU Article 46, which limits the Court's jurisdiction under the TEU to a specific list of subjects, which do not include any aspects of the treaty's Title V (the CFSP). However, the Constitution includes an unprecedented, albeit limited, insertion of the Court into the CFSP. Article III-376 permits the Court to review two types of activity in this field.

First, the Court may "monitor compliance with Article III-308," which states that CFSP activities may not affect the Union's competences as set forth in Articles I-13 to I-15 and I-17 of the Constitution. Article III-308 also states that implementation of these articles may not affect the competences of the EU in the CFSP. The Court will thus be empowered to referee disputes over the interface of the Union's general authority and its specific authority relating to the common foreign and security policy. Second, Article III-376 permits the Court to "rule on proceedings, brought in accordance with the conditions laid down in Article III-365(4), reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter II of Title V" (articles III-294 to III-313 – the CFSP provisions). Article III-365(4) generally permits the Court to review the legality of EU action that affects "third parties" if a person challenges an act that is addressed to him or her or is otherwise of "direct concern" and "does not entail implementing measures."

The second area of extension of the Court's jurisdiction relates to those portions of the Constitution's "area of freedom, security and justice" (AFSJ) that formerly comprised the Union's Third Pillar under the TEU.[811] Simply stated, the Constitution would abandon the Pillar structure, and, except as noted below, all of the AFSJ would be subject to the Court's ordinary jurisdiction, under the following provisions:

> --Article III-365 (action for annulment – comparable to EC Treaty Article 230);
>
> --Article III-367 (complaint for failure to act – comparable to EC Treaty Article 232); and
>
> --Article III-369 (plea of illegality – comparable to EC Treaty Article 241).

[811] Constitution arts. III-257 to III-277; TEU arts. 29-42. For a delineation of those provisions in the AFSJ that have their basis in the Third Pillar, see Chapter 16 of this treatise.

The exception to this general jurisdiction is expressed in Article III-377 of the Constitution, which states that the Court has no authority to review "the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State" or the activities of a Member State "with regard to the maintenance of law and order and the safeguarding of internal security."

The approach of the TEU is quite different. TEU Article 46 states that the powers of the Court in the Third Pillar are specifically *limited* to those enumerated in TEU Article 35. That provision identifies three areas in which the Court may act:

> --Article 35(1) states that the Court may give preliminary rulings on the "validity and interpretation" of EU Third Pillar measures, but Article 35(2) makes subparagraph (1) applicable only to those Member States that have affirmatively accepted such jurisdiction.
>
> --Article 35(6) permits the Court to hear EC Treaty Article 230 actions for annulment brought by a Member State or the Commission to challenge a Third Pillar framework decision or decision.
>
> --Article 35(7) authorises the Court to rule on disputes between Member States regarding the interpretation of Third Pillar acts, as well as disputes between the Commission and Member States regarding "conventions" adopted under the Third Pillar.

Any other acts relating to the Third Pillar are outside the Court's jurisdiction, and TEU Article 35(5) contains specific prohibitions on the tribunal's authority in matters of Member State police and law enforcement services, maintenance of law and order and safeguarding of internal security.[812] These restrictions are the same limits that have been carried over into Constitution Article III-377.

A third jurisdictional extension for the Court is that actions for annulment of an EU regulatory act may be brought by an individual under Article III-365(4) of the Constitution if the act "is of direct concern to him or her and does not entail implementing measures." The corresponding provision in Article 230 of the EC Treaty requires that an action can be brought only if the regulatory act is of "direct and individual concern" to the plaintiff. This

[812] EC Treaty Article 68(2) contains a similar restriction on the Court's jurisdiction in "any measure of decision taken pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security."

extension lacks the political impact of expanded jurisdiction in the CFSP and AFSJ, but its practical impact might be significant.[813]

Beyond these jurisdictional matters, two phrases in the Constitution affirm the role of the Court as guardian of EU law. Article I-29(1) mirrors the language of Article 220 of the EC Treaty and requires the Court to "ensure respect for the law in the interpretation and application of the Constitution." The treaty provision requires the Court to "ensure that in the interpretation and application of this Treaty the law is observed."[814] In addition, the Constitution's Article I-26(1), which describes the Commission and its responsibilities, states that the Commission "shall oversee the application of Union law under the control of the Court of Justice." This is a statement not found in either of the Treaties. The Constitution's two phrases may not constitute an actual endorsement of the Court's historically activist approach, but they certainly do not support any curtailment of the Court's role.

An additional item worthy of note is that the Constitution partially subjects the Court to the expanded public access provisions of Article I-50(3). This article requires each EU institution to make its documents available to the public. The Court is not included in the EC Treaty's corresponding Article 255(1). However, Constitution Article III-399(1) states that the Court (and the European Central Bank as well) "shall be subject to the provisions of Article I-50(3) . . . only when exercising their administrative tasks." Administrative tasks are not defined, but Article III-399 is obviously intended to maintain the confidentiality of the Court's deliberations on pending cases.

5.2 **The Member States' interaction with the Court**

The Constitution offers several areas in which each Member State has direct input into matters relating to the Court of Justice. First, pursuant to Constitution Article I-29(2), the Court is to be comprised of one judge from each of the Member States, and the appointment of judges is to be accomplished by "common accord" of the states.[815] Second, Article III-375(1) provides that in suits in which the Union is a party the Court's jurisdiction is exclusive only to the extent that jurisdiction is specifically conferred by the Constitution. In other cases, the courts of the Member States will have concurrent jurisdiction. Related to these limits is the fact that the Court's

[813] See the discussion in Piris, supra note 304, at 14.
[814] EC Treaty art. 220.
[815] Constitution art. III-355. Advocates-General and members of the General Court (formerly the Court of First Instance) are also chosen by common accord of the Member States. Constitution arts. III-355, III-356.

jurisdiction is limited, as described above, in matters of the common foreign and security policy, certain aspects of police operations, maintenance of law and order, and matters of internal security. Finally, according to Constitution Article III-381, certain provisions of the Court's Statute (which is appended to the Constitution) may be amended only through the elaborate procedure required to amend the Constitution itself, which requires ratification by each of the Member States.[816]

The Constitution's provisions on membership and appointment to the Court by common accord are essentially the same as found in EC Treaty Articles 221 and 223. Likewise, Article 240 of the EC Treaty provides that the Court's jurisdiction in suits against the Union is exclusive only to the extent that jurisdiction is specifically conferred by the Constitution, and thus in other situations the courts of the Member States will have concurrent jurisdiction. Furthermore, the Statute of the Court of Justice is appended as a protocol to the EC Treaty and TEU,[817] and according to EC Treaty Article 245, Title I of the Statute may be amended only through the treaty amendment procedure, requiring ratification by the Member States.[818]

A change from the Treaties is that Article III-357 of the Constitution creates a new panel to give an "opinion" on the suitability of nominees to the Court. This panel will be appointed by the Council of Ministers and will consist of seven members who must be former judges of the Court of Justice, the High Court or a national supreme court, or "lawyers of recognised competence." One of the panel members "shall be proposed by the European Parliament."

The most notable development in the Constitution is the expansion of the Court's jurisdiction in the CFSP and the AFSJ. Except for this, the Treaties' provisions relating to the interface between the Member States and the Court of Justice have been transferred into the Constitution with little substantive change. The new panel to review nominees to the Court might offer some further input from the Member States as to the Court's composition, but their primary contribution would arise in the process of nominating members to the Court and then reaching common accord on the full membership of the Court. Through concurrent jurisdiction, the EC Treaty and Constitution both allow substantial involvement of the Member State courts in dealing with matters of EU law.

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[816] See Constitution art. IV-443 (the amendment procedure).
[817] Protocol on the Statute of the Court of Justice, Dec. 12, 2002, O.J. (C 325) 167 [hereinafter Protocol on Statute of Court of Justice].
[818] See TEU art. 48 (the treaty amendment procedure).

6. OTHER INSTITUTIONS AND ORGANS

The European Central Bank, Court of Auditors, European Investment Bank, Committee of the Regions and Economic and Social Committee are dealt with in detail in the Constitution.[819] However, these institutions would not be changed under the Constitution in any manner impacting the EU's dividing lines. The Central Bank would retain its independence from Member State influence. The Court of Auditors would retain its largely internal role, also independent of Member State influence, although Member States would be required to cooperate when the Court audits national activities relating to EU revenues and expenditures. The Members of the European Investment Bank would remain the Member States themselves.

The advisory committees are just that – advisory bodies with little power. However, the Constitution does offer them somewhat more than they possess under the Treaties. Article 8 of the Constitution's Protocol on the Application of the Principles and Subsidiarity and Proportionality grants the Committee of the Regions the right to commence an action with the Court of Justice to challenge any new EU legislative act on the ground that it violates the principle of subsidiarity.[820] This is similar to the right granted to Member State governments in the same section of the Protocol. Article 9 of the Protocol provides that the Commission must also provide annual reports to both of the committees (as well as to the Member States and the major EU institutions) regarding the compliance of new EU laws with the subsidiarity principle.[821] Neither the right of action nor the right to receive reports is found in the Treaties or their protocols.

7. INSTITUTIONAL CHANGES AND THE DIVIDING LINES

This chapter has explored the principal institutions and has noted that the Constitution does propose some changes to their structure and their responsibilities. Let us consider whether the most prominent of these innovations would affect the EU's dividing lines.

The *European Parliament's* role in legislation (co-decision) and in budgetary matters would be expanded, but no major institutional change (such

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[819] See Articles I-30 and III-185 to III-202 (European Central Bank); I-31 and III-384 to III-385 (Court of Auditors); III-393 to III-394 (European Investment Bank); I-32 and III-386 to III-392 (the advisory committees).
[820] Protocol on Subsidiarity, supra note 273, art. 8.
[821] Id. at art. 9.

as the right of legislative initiative) is offered. In reality, no constitutional provisions relating to the Parliament would impact the dividing lines.

The *European Council* and its responsibilities would be more clearly identified, and its new President would be a dramatic development. However, the prominence of the President is not accompanied by any competence-shift to Brussels. A more coherent voice for the Union does not constitute a dividing line shift vis-à-vis the Member States.

The *Council of Ministers* would receive a new formula for qualified majority voting, a new Union Minister for Foreign Affairs, and a mandate to meet in public when legislating. The QMV formula may be seen as merely a technical adjustment, and the new Minister might offer greater coherence, but none of these changes affects the dividing lines.

The *Commission* would be reduced in size, and its right to propose new legislation might be modestly affected in the AFSJ as well as by the new right of citizen initiative. Arguably, the elimination of representation by all Member States reduces somewhat the ability of the states to influence the course of EU activity, thus creating a minor shift in one of the dividing lines. In legislation, the more demanding requirements for Member State initiatives in the AFSJ arguably strengthen the Commission, while the citizen initiative might undercut the Commission, but these dividing line movements are of relatively little consequence.

The jurisdiction of the *Court of Justice* would be extended into new areas in the Treaties' Second and Third Pillars. This is arguably a real dividing-line shift, because where the Court gains power, the national courts generally lose. However, even this development must be seen as relatively incremental. This is not a wholesale increase in the Court's competence, nor an overt reduction in the powers of the national courts. This shift represents a thoughtful attempt to provide greater accountability in the CFSP and greater efficiency and predictability in the AFSJ.

In light of the above summaries, it is fair to conclude that in broad terms the institutions under the Constitution would have maintained their essential character, their functions and their mandates. It might be speculated that the structural changes to the institutions could have led to their increased strength and effectiveness, and that these qualities could result in a stronger Union that would better be able to draw power away from the Member States. However, this is a theoretical possibility at best. In general, the Constitution's

treatment of the EU institutions does not appear intended to significantly shift the Union's dividing lines.

Chapter 14

Instruments and Procedures Available to the EU

This chapter addresses the techniques that may be employed by the EU institutions in the process of making laws and decisions. On these matters the Constitution displays a good measure of innovation. The primary focus here will be on the EU's legal instruments and acts, although we will also briefly address the matter of co-decision by the European Parliament and the designated role of Member State law in EU affairs. As noted at the end of this chapter, the proposed changes in these matters appear to have minimal impact on the EU's dividing lines. Nevertheless, this analysis is included to provide a fuller description of the Constitution and to provide information relevant to the workings of the EU institutions and to the subjects discussed in Chapters 15, 16 and 17.

1. TYPES OF LEGAL ACT

1.1 **The Union may use a variety of instruments and acts**

a. The primary legal instruments

Articles I-33 to I-44 of the Constitution, grouped under the title "Exercise of Union Competence," describe the functioning of the EU institutions in their legislative and regulatory activity. According to Article I-33(1), six "legal instruments" are to be employed by the institutions:

> (1) A European law is "of general application" and "binding in its entirety and directly applicable in all Member States."
>
> (2) A European framework law is "binding, as to the result to be achieved, upon each Member State to which it is addressed, but

> shall leave to the national authorities the choice of form and methods."
>
> (3) A European regulation is "of general application for the implementation of legislative acts and certain provisions of the Constitution." It may be binding in its entirety and directly applicable, or binding as to the result to be achieved while leaving to the states the form and methods of its application.
>
> (4) A European decision is binding in its entirety, but if certain parties are specified in the decision, it will be binding "only on them."
>
> (5) Recommendations are simply that – they "shall have no binding force."
>
> (6) Opinions are likewise pronouncements that "shall have no binding force."

Among the six instruments, European laws and European framework laws are classified in Articles I-33(1) and I-34 as "legislative acts" that are generally adopted through action involving the Commission, Council and European Parliament. On the other hand, European regulations and European decisions are defined in Articles I-33, I-35 and I-36 as "non-legislative acts" and may be issued, as specifically mandated in the Constitution, by the European Council, Council, Commission or European Central Bank. Article I-12(6) notes that specific provisions of Part III of the Constitution will contain the "scope of and arrangement for" exercising the Union's competences.

The Constitution's primary forms of legislation are similar to the five principal types currently provided under Article 249 of the EC Treaty:

> (i) A regulation (renamed in the Constitution as a "European law") has "general application" and is "binding in its entirety and directly applicable in all Member States."
>
> (ii) A directive (renamed as a "European framework law") is "binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

(iii) A decision (renamed as a "European decision") is to be "binding in its entirety upon those to whom it is addressed."

(iv) A recommendation (no change in designation) has "no binding force."

(v) An opinion (no change in designation) likewise has "no binding force."

The EC Treaty does not include a description of what the Constitution refers to as "European regulations."

The complexity of the treaty approach arises from the fact that activities relating to the common foreign and security policy (the TEU's Second Pillar) and cooperation and justice in home affairs (Third Pillar) do not fit within the five categories specified in EC Treaty Article 249. Rather, the Second and Third Pillars are subject to their own types of legislation, such as "common strategies," "joint actions" and "common positions" in the Second Pillar,[822] and "common positions," "framework decisions" (similar to directives), "decisions" and "conventions" in the Third Pillar.[823]

b. Additional forms of activity

In addition to employing the six legal instruments, the Constitution authorises the EU to engage in other types of activity.[824] The following are primary examples:

(1) Article I-15 requires the Union to adopt "measures" and "guidelines" to assist Member States in coordinating their economic and employment policies, and the Union may take "initiatives" to assist the states in coordination of their social policies.[825]

(2) Article I-12(5) permits the EU to "carry out actions to support, coordinate or supplement the actions of the Member States"

[822] TEU arts. 13-15.
[823] TEU art. 34.
[824] See also discussion of the Open Method of Co-ordination in part 5.2 of Chapter 10 of this treatise.
[825] Constitution arts. I-15(1), (2), (3). See discussion of the Open Method of Co-ordination in part 5.2 of Chapter 10 of this treatise.

in "certain areas and under the conditions laid down in the Constitution."[826]

(3) Article III-323(1) permits the Union to "conclude an agreement with one or more third countries or international organisations."

(4) Article III-324 permits the EU to enter into "association agreements" with third countries or international organisations in order to create "an association involving reciprocal rights and obligations, common actions and special procedures."

(5) In Part III of the Constitution, the Commission is granted administrative, investigative and enforcement powers to ensure the proper application of EU law.[827] Employment of these powers, especially at the investigative stages of an activity, may take the form of particular actions that do not necessarily fall within the primary forms of act described in Article I-33.

The EC Treaty also refers to several of the additional forms of action described in the Constitution. These include the following:

(i) Article 3 requires the Community to engage in the "promotion of coordination" relating to Member State employment policies, and Article 127(1) states that it must "contribute" to high employment by "encouraging cooperation," "supporting" and "complementing" the actions of the states. Article 128(2) mandates that the Community draw up "guidelines for employment."

(ii) EC Treaty Article 99(2) calls on the Council to draft "broad guidelines" for the economic policies of the Member States, and Article 202 requires the Council to "ensure coordination" of these policies.

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[826] See discussion of the Open Method of Co-ordination in part 5.2 of Chapter 10 of this treatise.

[827] See, e.g., the Commission's extensive role in enforcing EU competition law. Constitution arts. III-165, III-168.

(iii) Community action to "support," "coordinate" or "supplement" Member State action is provided in various provisions of the EC Treaty.[828]

(iv) Several articles in the EC Treaty permit the Community to enter into agreements with third countries and international organisations."[829]

(v) EC Treaty Article 310 contemplates the Community entering into "association agreements" with third countries or international organisations."

(vi) The Commission is granted administrative, investigative and enforcement powers to ensure the proper application of EU law.[830] As noted above with regard to the Constitution, use of these powers, especially at the investigative stages of an activity, may take the form of particular actions that do not necessarily fall within the primary forms of act described in EC Treaty Article 249.

c. Choosing a form

Unless the Constitution specifies the type of instrument or procedure that should be used in a particular instance, Article I-38(1) states that it will be left to the EU institutions to decide "on a case-by-case basis" what form of action to take. Likewise, in the case of a European regulation, Article I-33(1) provides that the Union institutions must choose whether it will be "binding in its entirety and directly applicable in all Member States," or binding simply "as to the result to be achieved, upon each Member State to which it is addressed." If the latter, the national authorities are free to choose the appropriate "form and methods" of local implementation. Article I-38(2) requires that legal acts of the EU must state "the reasons on which they are based," and Article I-39 mandates that most acts must be formalised and published prior to taking effect. Article I-38(2) mirrors EC Treaty Article 253,

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[828] See, e.g., EC Treaty arts. 149(1) (regarding education policy), 150(1) (vocational training), 151(2) (culture), 152(2) (public health), 153(3) (consumer protection), 155(1) (trans-European networks), 157(3) (industry), 159 (economic and social cohesion) and 163(2) (research and technological development).

[829] See, e.g., EC Treaty arts. 174(4) (regarding environmental matters), 181 (development cooperation), 181a (economic, financial and technical cooperation with third countries).

[830] See, e.g., the Commission's extensive role in enforcing EU competition law. EC Treaty art. 85.

and Article I-39 is substantially identical to EC Treaty Article 254. Articles I-38(1) and I-33(1) have no antecedents in the Treaties. However, these new provisions arguably do no more than state the obvious fact that when the Commission exercises its right of initiative – or when any other institution takes action – it is the inherent right of the institution to propose which available form of action it will take under the circumstances.

d. Comment

As described above, the Constitution consolidates the possible instruments for EU action. In so doing, it renames three of the five types of act described in the EC Treaty, and it adds "European regulations" as a new form of action. Furthermore, under the Constitution the special types of activity described for the Second and Third Pillars in the TEU would be carried out through means of the same six legal instruments as used in all other forms of EU law-making. The Constitution's classification of acts as either "legislative" or "non-legislative" is also new, although its significance is not readily apparent. Also, although Community action to "support," "coordinate" or "supplement" Member State action is provided in various provisions of the EC Treaty, the general statement in Constitution Article I-12 that the EU may "carry out actions to support, coordinate or supplement the actions of the Member States" in "certain areas and under the conditions laid down in the Constitution" has no precedent in the Treaties.

The EU is a complex organisation with wide-ranging responsibilities. The variety in its array of potential acts is necessary for its successful operation. The Constitution's six primary forms of law-making for all fields of activity represent a simplification from the Treaties, whose Three Pillars each had their own distinct type of legislative and regulatory act. The variation among the Pillars is unnecessarily confusing. However, despite some improvement offered by the Constitution, it has been noted above that other forms of action would be possible, and thus the picture would be more complicated than suggested by Article I-33.

Herwig C. H. Hofmann has written a detailed analysis of the "typology of acts" in the Constitution, including comparison with the Treaties.[831] He notes that the constitutional changes emerged from a longstanding debate that included concerns about "the democratic legitimacy of EC/EU decision-making," whether EU legislation should be modeled after Member State forms of law, the balance of power among the EU institutions,

[831] Hofmann, supra note 597.

and the lack of "elegance or clarity" displayed in the Treaties.[832] Hofmann notes many subtleties in analysing EU legislation, and he recognises that the proposed system under the Constitution "has its faults."[833] Nevertheless he concludes that the Constitution represents a "very welcome step in reducing the intransparencies of the EU's legal system and adding to its overall maturity."[834]

1.2 Member State participation in EU law-making

In broad terms Article I-5(2) of the Constitution requires the Member States to "take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Constitution or resulting from the acts of the institutions of the Union." This means that the governments of the states must cooperate with EU institutions in their regulatory and enforcement activities. For example, the Member States have cooperative responsibilities relating to enforcement of EU competition law.[835] In addition, the rules of procedure and the competent authorities of the Member States may be used to enforce "pecuniary obligations" imposed by EU law on "persons other than Member States."[836] Article I-5 reflects Article 10 of the EC Treaty, which requires the Member States to "take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community." The EC Treaty also requires the governments of the States to cooperate with the Commission in enforcing Community competition law.[837] In addition, the rules of procedure and the appropriate authorities of the Member States may be used to enforce "pecuniary obligations" imposed by Community law on "persons other than States."[838]

In the case of European framework laws and certain European regulations, Articles I-33(1) and I-37 of the Constitution contemplate implementation by the Member States, and in these circumstances Article I-33(1) states that the Member States are free to choose the "form and methods" of how to fulfill their responsibilities. The actual means of implementation will left entirely to the individual states, although the results achieved by each

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[832] Id. at 1-2.
[833] Id. at 25.
[834] Id. at 24. For an evaluation of the Constitution's simplification of legal instruments, see Kokott & Ruth, supra note 116, at 1340-43.
[835] Constitution arts. III-165, III-168.
[836] Constitution art. III-401.
[837] EC Treaty arts. 85, 88.
[838] EC Treaty art. 256.

state must be consistent with the EU mandate. The Constitution's requirement of Member State implementation has its origins in the EC Treaty's definition of directives. Article 249 of the EC Treaty states that a directive "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." The actual means of implementation will depend upon national or local law and the particular legal mandates for national or local officials.

A specific reservation in favor of the Member States is found in Article I-12(5) of the Constitution, which provides that in cases where the Union acts to "support, coordinate or supplement the actions of the Member States," EU involvement may not supersede Member State competence in the field. This provision has no precedent in the Treaties.

Article I-34(3) of the Constitution notes that in "specific cases provided for in the Constitution" a group of Member States may initiate the EU legislative process. An example is the provision in Article III-264 permitting one-fourth of the Member States to initiate legislation pertaining to administrative cooperation in the area of freedom, security and justice.[839] Such actions are also mentioned in the Treaties. For example, TEU Articles 34 and 42 provide that the Council may act in the Third Pillar on the initiative of any Member State. In addition, EC Treaty Article 67(1) provided for a temporary right of initiative by any Member State in matters relating to the area of freedom, security and justice; this right has now expired.

Finally, it is noteworthy that an amendment to the Constitution may be initiated by a proposal from any Member State to the Council under Article IV-443(1) or to the European Council under Article IV-445(1). This right is a reflection of Article 48 of the TEU, which provides that any Member State may submit proposals to amend the Treaties.

In general, the responsibility of Member States to cooperate in enforcing EU law, their limited right to initiate EU legislation and their right to trigger the treaty amendment process do not change from the Treaties to the Constitution. However, relating to local implementation of EU law, the Constitution adds "European regulations" as a new class of EU action. Likewise, there is no Treaty counterpart to the Constitution's reservation that Union action to "support, coordinate or supplement the actions of the Member States" may not supersede Member State competence in the field.

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[839] Article III-264 cross-references articles relating to judicial cooperation in criminal matters and cross-border police cooperation.

Herwig C. H. Hofmann contends that the "structure of the typology of acts and the allocation of decision-making procedures is at the heart of the relation between the Member States . . . and the EU powers."[840] This cannot be contested, because law-making procedures both reflect and determine the roles that various institutions will play. Nevertheless, as the above analysis indicates, the Constitution would have changed very little in regard to the Member States' role in EU law-making or enforcement. Interestingly, Andreas Føllesdal expresses concern about "the allocation of enforcement authority, which is still largely left with the Member States."[841] Citing the ongoing dispute over the Stability and Growth Pact, he warns that "partial compliance" by certain states "may unravel trust among citizens and officials."[842] A greater enforcement role at the central level – most likely through the Commission – would create more uniformity in the application of EU law, and it would offer less opportunity for individual Member States to arbitrarily apply Union law for their own purposes or to their exclusive benefit.

2. CO-DECISION AS THE ORDINARY PROCEDURE

Article I-34(1) of the Constitution provides that "legislative acts" of the Union, which are "European laws" and "European framework laws" are to be adopted "jointly by the European Parliament and the Council under the ordinary legislative procedure as set out in Article III-396."[843] Under co-decision, Parliament's refusal to approve legislation will result in its not being adopted. Article I-34(2) also contemplates certain legislative acts being adopted "by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament," but these instances will be considered exceptional circumstances specifically provided for in the Constitution, and their procedures are considered "special legislative procedures."

The EC Treaty contains the co-decision procedure in Article 251, and the Constitution's ordinary procedure has been modeled on this article. However, Article 252 of the EC Treaty maintains a "cooperation" procedure as an alternative law-making method, and under this procedure the European Parliament is consulted but has no final authority to block the legislation. Cooperation has been steadily excised from the EC Treaty, and today its use

[840] Hofmann, supra note 597, at 1.
[841] Føllesdal TFT, supra note 323, at 7.
[842] Id.
[843] For the details of the ordinary procedure, see Constitution art. III-396.

is limited to a few provisions relating to economic and monetary union.[844] Under Article I-34 of the Constitution, co-decision is the "ordinary legislative procedure," and cooperation is entirely eliminated.

Beyond the cooperation procedure, Jean-Claude Piris has identified approximately 30 instances under the Treaties in which decisions or other acts may be taken by the Council without participation by the Parliament or after consultation with the Parliament.[845] All of these matters would be subject to co-decision under the Constitution.

These developments would have had an obvious inter-institutional impact within the EU, but they would not affect the balance of competences and powers of the Union vis-à-vis those of the Member States.

3. A PLACE FOR MEMBER STATE LAW

As previously discussed in Chapter 8, Article III-426 of the Constitution grants the EU capacity as a legal person under the laws of the Member States, and in particular, the rights to own property and to be a party to legal proceedings.[846] Likewise, under Article III-431 the Union is specifically made subject to the contract law of individual Member States and to tort law based on "the general principles common to the laws of the Member States." The provisions of Article III-426 are identical to the grant of authority to the Community under Article 282 of the EC Treaty, while Constitution Article III-431 retains the substance of EC Treaty Article 288. The TEU, which does not create legal capacity for the EU, also does not contain any provisions relating to the Union's relationship to Member State law. Thus, the Constitution would expand upon the Treaties and bring the entire EU into a direct relationship with Member State law.

Although these provisions of the Constitution reinforce the legal personality of the EU, they also underscore the vitality of Member State law. Wherever the EU has a physical presence within any of its states, it would be subject to a host of local and national laws relating to its movable and

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[844] The only instances in which the cooperation procedure is found after the Treaty of Nice relate to certain matters of economic and monetary union. See EC Treaty arts. 99, 102, 103, 106.

[845] These items, along with their counterpart Constitution provisions, are listed in Piris, supra note 304, at 209, Annex 2.

[846] The discussion in part 1.1 of Chapter 8 points out that this capacity may be referred to as "private law personality," in contrast to the "public law personality" granted to the Union under Article I-7 of the Constitution.

immovable physical property. Also, in contracting for goods and services, the Union would be subject to "the law applicable to the contract in question."[847] Strictly speaking, this need not be local contract law, because the EU and its contracting party could select a different jurisdiction's law, but national contract law of some sort would likely be a factor. In the area of "non-contractual liability" (tort), the Union would be required to "make good any damage" it causes, with its liability to be determined "in accordance with the general principles common to the laws of the Member States."[848] This perhaps might not lead immediately and directly to the local law where the incident occurs, but it seems highly unlikely that the EU in a proceeding before a local court would try to assert its rights on the basis of principles established in other Member States.

As this analysis has shown, in certain matters of contract and tort the Constitution would preserve and actually broaden the EU's subjection to Member State law. The existing dividing lines in these areas would be maintained and made even brighter.

4. INSTRUMENTS, PROCEDURES AND THE DIVIDING LINES

The Constitution provides for a simplified set of six legal instruments to be used in EU law-making, and on the surface this would be a noteworthy improvement over the complex legislative scheme of the Treaties with their Three Pillars. As noted, however, the constitutional system is actually more complex than it appears at first blush. In any event the question remains as to whether the Constitution's new approach would have any impact on the dividing lines. Do simplification and more transparency result in any net gains for Brussels? It is difficult to imagine any such gain, and thus our conclusion is that the dividing lines are not affected.

It is noteworthy that the Member States are called upon in the Constitution to work side-by-side with the Union to "ensure fulfillment" of EU law, and in the case of framework laws (currently directives) national implementing laws are required, with each state being free to choose the form and method of implementation. This role for the national governments is significant, signaling a partnership between the states and the EU, but its character would not change from the relationship described in the Treaties.

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[847] Constitution art. III-431.
[848] Constitution art. III-431.

The Constitution's elimination of the EC Treaty's cooperation procedure in favor of co-decision in all cases might represent a slight inter-institutional shift of power to the European Parliament, but this would not affect the dividing lines between the EU and the Member States.

The Constitution's expansion of the affect of Member State law to include the full Union, rather than merely the European Community, would be a slight extension of the impact of national law on the institutions of the EU. However, this is at best a technical change, and it does not appear that it would affect the dividing lines as they are described in this treatise.

In concluding this brief analysis of instruments and procedures, we do well to recall several procedural concepts that have a bearing on all EU legislation. First, Member State parliaments must be advised of all proposed EU legislation, and they may object, force reconsideration or bring a challenge to the Court of Justice if they feel that the law will violate the subsidiarity principle. Second, a citizen initiative may propose legislation where the Union institutions choose not to do so. Third, the requirement for unanimous Council decisions in many instances and the general necessity for consensus on the European Council create a veto right for each Member State in critical areas of EU legislation. Fourth, where the EU is unable to legislate due to lack of sufficient consensus, groups of Member States may bypass the Union by engaging in some form of enhanced cooperation. These principles are beyond the technical focus of this chapter, but no discussion of legislative procedures should overlook their significance.

Chapter 15

Where QMV Replaces Unanimous Voting or Applies to New Subjects

A recurring and important theme in this treatise is the fact that the Constitution would have preserved the two primary voting requirements that have been available to the Council of Ministers and the European Council, namely, unanimity and qualified majority vote (QMV). The policy-making European Council must generally decide by consensus,[849] but the real battleground on voting is at the Council of Ministers, where most legislation is approved. At the Council level the Constitution's preference for QMV is clear enough,[850] but it is equally obvious that certain critical decisions would have remained subject to approval by all Council representatives.

This chapter offers a detailed description of where the Constitution embraces QMV decision-making either as a departure from unanimity required under the Treaties or in a new field of EU activity. This analysis will be divided into four parts. Section 1 provides a brief perspective on why the European Union would choose unanimity or QMV. Section 2 identifies those instances in which a requirement of unanimity in the Treaties would be changed to qualified majority voting under the Constitution. These areas are seen to represent a diminishment of the national blocking power. Section 3 describes the *new* subjects of legislation in the Constitution for which the qualified majority vote would be the means of Council action. These are areas which could have been designated for unanimous Council voting, but QMV was selected. Finally, to illustrate the continuing vitality of unanimous voting in certain fields, section 4 introduces the **Addendum**, which identifies all of

[849] Constitution Article I-21(4) states: "Except where the Constitution provides otherwise, decisions of the European Council shall be taken by consensus."
[850] Constitution Article I-23(3) states: "The Council shall act by a qualified majority except where the Constitution provides otherwise."

the constitutional articles in which unanimity or another form of unity would have been required on the Council and the European Council. These provisions highlight the substantial number of policy areas in which the Member State veto power would have been retained.

It should be noted that the primary purpose of this chapter is to evaluate whether the Constitution significantly shifts voting on the Council from unanimity to qualified majority. The mechanics of QMV, especially the voting formulas, have been addressed in part 3 of Chapter 13.

1. THE SIGNIFICANCE OF UNANIMOUS DECISION-MAKING

As discussed in Chapter 11 of this treatise, a foundational principle of international law is that all parties to a treaty must consent to its initial ratification and its subsequent amendment.[851] Likewise, when a group of nations has contracted to form an international organisation, history indicates that they have expected unanimity to be the general rule for decision-making within the new entity. Stephen Zamora has observed:

> Under traditional international law, as exemplified by early diplomatic conferences, two basic truths controlled the question of voting: every state had an equal voice in international proceedings (the doctrine of sovereign equality of states), and no state could be bound without its consent (the rule of unanimity). These rules were bound together, and were extensions of the general principle of the state's sovereign immunity from externally imposed legislation.[852]

The straightforward expectation of absolute sovereignty has a major flaw, however. It inhibits the actual achievement of results. Zamora adds:

> The disadvantage of the rule of unanimity, of course, is that international agreement is impossible to obtain when any single participant can block a decision; to achieve unanimous consent, the strength of a decision must be diluted so as to please everyone. Either result is unsatisfactory for an effectively functioning international organization that is charged with making and implementing decisions to meet urgent, practical problems.[853]

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[851] Vienna Convention, supra note 549, arts. 24, 40.
[852] Stephen Zamora, Voting in International Economic Organizations, 74 Am. J. Int'l L. 566, 571 (1980).
[853] Id. at 574.

Andreas Føllesdal concurs. Referring to voting patterns within the European Union he notes that "the multiple veto points ensuring stability easily leads to stagnation, preventing common action even where required."[854] Even worse than inaction, according to Føllesdal, is that a nation may threaten a veto to exact concessions in its favor: "Thus many hold that this safety valve has been abused by some Member States to extort unfair benefits from cooperation."[855] The EU Commission White Paper of 2001 echoed this concern, noting that a consensus requirement often "holds policy-making hostage to national interests."[856] The consequence of this reality is, according to Zamora, that international organizations have gradually abandoned unanimity in favor of majority rule.[857] But this trend has led to inevitable conflicts,[858] and the European Union has reflected this tension.

According to Youri Devuyst, the founders of the European Community were determined to avoid the shortcomings of previous organisations. He quotes Paul Henri-Spaak as having stated that "unanimity formulae are the formulae of impotence."[859] To avoid the "unanimity trap" Devuyst describes Spaak as urging the Community's initial members to "leave ancient notions of sovereignty behind and accept the principle of majority voting."[860] This was not to be grounded in mere idealism, but in recognition that a successful Community would advance the "substantive political and economic preferences" of the Member States.[861]

Notwithstanding the practical appeal of majority voting, the force behind it was by no means irresistible as the EU developed.[862] To the contrary, national interests at times appeared to be an immovable object, as in the 1965 episode of the French "empty chair" to protest the Treaty of Rome's

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[854] Føllesdal TFT, supra note 323, at 5.
[855] Id.
[856] White Paper, supra note 52, at 29.
[857] Zamora, supra note 852, at 574.
[858] Id. at 566.
[859] Devuyst, supra note 68, at 30.
[860] Id.
[861] Id. at 8.
[862] It is appropriate to note that qualified majority voting as a means of making decisions among the Member States is a step well short of full delegation of authority to the EU institutions. Andrew Moravcsik describes QMV as an example of "pooling" of sovereignty, as contrasted with the delegating of sovereignty that takes place when Union institutions (the Commission one example) are given the power to make and carry out law without consulting the Member States. Andrew Moravcsik, The Choice for Europe: Social Purpose and State Power from Messina to Maastricht 67 (1998).

phase-in of qualified majority voting in certain policy fields. French representatives simply boycotted Community activities for a seven-month period, until the Luxembourg Accord was adopted to allow any Member State to halt Community action that might threaten its vital interests.[863] Paul Craig comments that this was "the prime example of negative inter-governmentalism."[864] Twenty years later the Single European Act finally overcame the Accord to enable the decision-making efficiency necessary for completion of the Community's internal market.[865]

Despite much progress toward qualified majority voting in the past 20 years, the path has been marked with many concessions toward preserving Member State sovereignty. For one matter, under the Treaties a qualified majority has always been defined in such a manner as to provide extra protection to the smallest states. In addition, there is a continuing attempt to reach consensus on the Council even on matters for which a QMV decision may be taken. Edward Best describes these phenomena as follows:

> [T]he "Founding Fathers" of Europe explicitly rejected "objective" keys and population, in favor of a distribution of votes reflecting a balancing act between the states. This balance was conceived in terms of clusters of states and responded to a general principle of "degressive proportionality" . . . by which the larger units are under-represented compared to the smaller ones. This in turn has loosely reflected the belief that, in such a diverse and sensitive union as the European Community, the pursuit of consensus and the protection of minorities are more important principles than simple majority rule.[866]

Other concessions have included opt-outs, derogations and transition periods for new policies,[867] and Volker Roben notes: "The trend to qualified majority voting in the Council of Ministers at the center is counter-balanced by the ever-increasing role on the periphery of the European Council."[868] Finally, despite the expansion of QMV, there remain many areas in which unanimity

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[863] Devuyst, supra note 68, at 31.
[864] Paul Craig, The Community Legal Order, 10 Ind. J. Global Legal Stud. 79, 86 (2003).
[865] Id. at 89-100. The Single European Act is cited in note 118, supra.
[866] Best, supra note 755, at 17.
[867] Devuyst, supra note 68, at 20-21.
[868] Volker Roben, Constitutionalism of the European Union After the Draft Constitutional Treaty: How Much Hierarchy, 10 Colum. J. Eur. L. 339, 359 (2004).

has been preserved, leaving much room for what Pavlos Eleftheriadis has termed "discretionary state action."[869]

The following sections will identify precisely where the Constitution would have increased the opportunities for qualified majority voting, and where it would have preserved the unanimity requirement. Please note that this chapter provides only a brief description of the identified matters. Greater elaboration and fuller context may be found in the subject matter analyses offered in Chapters 16 and 17.

2. WHERE UNANIMOUS VOTING WOULD CHANGE TO QMV

The Constitution contains a number of provisions in which voting or decision-making would be changed from a unanimity requirement in the Treaties to qualified majority voting. Each of these instances may be seen as a loss of Member State power, in that the states lose their right to block these decisions. This section identifies these new QMV subject matters and their predecessor provisions in the Treaties.

For the constitutional provisions described, the QMV requirement would arise, unless otherwise noted, as a result of the decision being subject to the "ordinary legislative procedure," which entails a QMV decision of the Council under Article I-23(3), and co-decision with the European Parliament under Articles I-34(1) and III-396. However, this analysis will not focus on the role of the Parliament, but solely on the Council's voting requirements.

2.1 **Institutional matters**

a. Council presidencies. Constitution Article I-24(7) provides for a qualified majority decision of the European Council to determine the system for rotation of the Council formation presidencies other than Foreign Affairs. This is a rare instance in which the European Council would vote by QMV. Under Article 203 of the EC Treaty the rotation of Council presidencies is to be determined by the Council of Ministers itself, acting unanimously. Under the Treaty, the Foreign Affairs formation is treated like all other formations, whereas under the Constitution it is to be headed by the new Union Minister for Foreign Affairs.

b. Commission. Under Article I-37(3) the Constitution provides for European laws to "lay down in advance the rules and general principles

[869] Eleftheriadis, supra note 85, at 38-39.

concerning mechanisms for control by Member States of the Commission's exercise of implementing powers." These European laws would require a QMV decision of the Council. There is not a directly parallel provision in the Treaties that addresses how to assign to the Member States the control over the Commission's implementing authority. Instead, EC Treaty Article 202 generally permits the Council to confer on the Commission the power to implement "rules which the Council lays down." The Council may "impose certain requirements in respect of the exercise of these powers," presumably including any assignment of authority to the Member States. In any event it must act according to "principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from Commission and after obtaining the opinion of the European Parliament." Thus, in at least one respect the unanimous approval required under the Treaty would be changed to a QMV decision under the Constitution.

c. Statute of ESCB and ECB. Article III-187(3) of the Constitution permits European laws to amend specified provisions in the Statute of the European System of Central Banks and of the European Central Bank, relating to monetary policy. These laws would require a QMV decision of the Council. In contrast, EC Treaty Article 107(5) identifies the same provisions in the Statute, and if an amendment to any of them is proposed by the Commission, the Council's vote on the matter must be unanimous. If such an amendment is proposed by the ECB itself, the Council may vote by QMV. The Constitution thus offers a shift to QMV for Commission-proposed amendments only. Arguably this would be an inter-institutional change that would remove a measure of protection for the ECB against unwanted adjustments to its Statute.

d. ECB Executive Board. Constitution Article III-382(2) permits the Executive Board of the European Central Bank to be appointed by a qualified majority vote of the European Council (euro-zone Member State representatives only[870]). This is a change from EC Treaty Article 112(2) which requires the appointment to be made by the *common accord* of the heads of state or government of the euro-zone Member States.[871]

e. Court of Justice Statute. Article III-381 of the Constitution allows a European law (requiring only a qualified majority vote of the Council) to amend all but Title I and Article 64 of the Statute of the Court of Justice. Title I sets the basic rights and duties of judges, while Article 64 governs the language arrangements at the Court, and amendments to these provisions

[870] Constitution art. III-197(2)(h).
[871] EC Treaty art. 122(3).

would require a constitutional amendment. The corresponding treaty provision is EC Treaty Article 245, which requires a *unanimous* Council decision for amendments to the Statute, with Title I (but not Article 64) excepted. While amendment to Article 64 actually becomes more demanding under the Constitution, requiring a constitutional amendment rather than a mere Council vote, in general the Constitution offers a broad shift to qualified majority voting for changes to the Statute.

f. Specialised courts. Constitution Article III-359 permits European laws to create and set the governing rules for specialised courts to be attached to the General Court (currently called the Court of First Instance). These laws would require a qualified majority vote of the Council, whereas similar provisions in Article 225a of the EC Treaty require a unanimous Council decision. Interestingly, the Constitution retains the Treaty's requirement that members of specialised courts be appointed by unanimous vote of the Council, and both the Treaty and Constitution permit a QMV Council vote to approve rules of procedure for the special panels.

g. Intellectual property jurisdiction. Pursuant to Constitution Article III-364, a European law may be approved by a QMV decision of the Council to confer jurisdiction on the European Court of Justice in regard to European Union intellectual property rights. This is a change from EC Treaty Article 229a, which specifies that such Council decisions be taken unanimously. In an age of increasing emphasis on intellectual property, the ability of the Council to more easily expand the Court's jurisdiction must be seen as an acknowledgment of the need for greater efficiency in EU lawmaking in this field.

2.2 **Resources and revenues**

a. Own resources. Constitution Article I-54(4) permits a European law with a QMV Council vote to implement measures relating to the Union's own resources. However, such an implementing law must be based on a policy previously approved by a unanimous Council vote. EC Treaty Article 269 requires unanimity at both stages. Because the budget is a politically sensitive area, it is apparently necessary to preserve the veto power of each Member State at the critical policy-setting stage. Any state that is concerned about subsequent implementation can withhold its vote at the policy stage until any controversial aspects of implementation are agreed in advance.

b. Revenues. Article III-412(2) of the Constitution permits the Council to adopt by QMV a European regulation governing how EU budget

revenues will be made available to the Commission. This is a change from EC Treaty Article 279(2), which does not contemplate a shift from unanimity to QMV.

2.3 Internal market

a. Social security. Constitution Article III-136 permits European laws or framework laws, approved by a QMV decision of the Council, to protect the social security of workers moving from one state to another within the Union. This is a change from the predecessor provision, EC Treaty Article 42, which specifies that the Council must act unanimously on these matters. Despite this potentially significant change, Article III-136(2) of the Constitution provides an "emergency brake" by which a Member State may refer the question to the European Council (for a unanimous decision) on grounds that a proposed EU law might "affect fundamental aspects of its social security system." Thus, under Article III-136 it is possible that some decisions by QMV might be made despite opposition, but realistically no Member State need fear that the Constitution would affect its sovereignty on any vital matter.

b. Freedom to provide services. The right of establishment and freedom to provide services are covered by Articles III-137 to III-150 of the Constitution, and these provisions correspond closely to Articles 43 to 45 of the EC Treaty. Under both the Constitution and the Treaty, EU legislation in these areas is governed by the general rule of QMV decision-making on the Council. One particular point of difference is that in relation to "the taking-up and pursuit of activities as self-employed persons," the Constitution consistently provides for QMV decisions, while Article 47(2) of the Treaty requires a unanimous Council decision "on directives the implementation of which involves in at least one Member State amendment of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons." The Constitution's elimination of this one unanimity requirement reflects a specific shift to QMV, the result of which could be more efficient EU decision-making on the matter of professional licensing.

2.4 Policies in other areas

a. Structural Funds and Cohesion Fund. Constitution Article III-223 addresses the point at which QMV will be permitted regarding the Structural Funds and Cohesion Fund. Under the Constitution the first provisions on these funds to be adopted after the signing of the Constitution would be

approved unanimously by the Council, and thereafter European laws (with Council QMV) would be utilised. This is a change from EC Treaty Article 161, under which QMV would replace unanimity on January 1, 2007, if a multiannual financial perspective and an Interinstitutional Agreement have been adopted. The constitutional provision represents a timing change, with no apparent alteration of the underlying policies.

b. Transport. European legislation to support a common transport policy is permitted by Constitution Article III-236(2), and the Council's decision on these new laws will be determined by qualified majority vote. Article III-236(3) requires that these laws take account of "cases where their application might seriously affect the standard of living and level of employment in certain regions, and the operation of transport facilities." In contrast, EC Treaty Article 71(2) states that where these special circumstances exist the EU legislation is subject to a unanimous Council vote. The Constitution's provision thus eliminates the veto of a Member State that might be concerned about the standard of living within one of its own regions or that of a different state.

2.5 **Area of freedom, security and justice**

Constitution Articles III-257 to III-277 provide for a wide variety of EU laws in the area of freedom, security and justice (AFSJ), and in most instances the decisions of the Council will be made by QMV. On the surface this appears to be a major shift from the Treaties. For example, under TEU Article 34(2) the Council is required to act unanimously in a number of matters that correspond to the Constitution's AFSJ provisions. Furthermore, EC Treaty Article 67(1) generally requires unanimity for decisions on matters found within Articles 61 to 69 of that treaty, which also correspond to certain constitutional provisions on AFSJ. EC Treaty Article 67(2) contemplates a move away from unanimity in this field, but it does require a unanimous Council decision to shift certain decisions to QMV.[872] Despite the fact that a Council decision in December, 2004, did institute QMV for certain matters under Articles 62 and 63,[873] the Constitution would apparently generate greater movement in this direction.

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[872] See Chapter 16 of this treatise (analysing the AFSJ).

[873] Decision of the Council of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty, Dec. 22, 2004, O.J. (L 396) 45 [hereinafter 22 December 2004 Council Decision]. The Decision approves QMV decisions on (i) the crossing of internal EU borders (EC Treaty art. 62(1), (ii) standards and procedures for checking persons crossing external EU

There is, however, a theoretical catch to all of this. Article III-258 of the Constitution requires the European Council to "define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice." Such action, of course, will require a unanimous decision. As a practical matter, these guidelines would ordinarily be on the broadest level, and the European Council would not insert itself into the details of lawmaking. However, as a political matter, a Member State with concerns as to the ultimate nuts and bolts of AFSJ legislation theoretically could object at the strategic guideline stage. Such an objection might be tabled to avoid future legislation that would be initiated by the Commission and ultimately voted upon by the Council through QMV. This scenario might be highly unlikely, but the Constitution seems to create the possibility.[874]

The specific voting changes relating to the AFSJ are as follows:

a. Administrative cooperation. Constitution Article III-263 permits the Council, by QMV, to adopt EU regulations relating to administrative cooperation in the area of AFSJ. TEU Article 34(2), although not specifically referring to administrative cooperation, requires unanimity for actions of this type.

b. Border controls. Article III-265 of the Constitution provides for EU laws, with the Council voting by QMV, to set forth a policy on border controls. This is a change from EC Treaty Article 62, in which measures on border controls are subject to the unanimity requirement of EC Treaty Article 67(1) unless the Council under Article 67(2) unanimously decides that QMV is to be employed. In fact, such a Council decision was made in December, 2004,[875] but the Constitution would enshrine the qualified majority vote.

c. Asylum. Constitution Article III-266(2) permits EU laws to determine a "common European asylum system," with the Council approving the measures by a qualified majority vote. This is a departure from EC Treaty Article 63, which contemplates such measures,[876] but under which

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borders (art. 62(2)(a)), and (iii) measures relating to third country nationals traveling within the EU (art. 62(3)). The Decision leaves intact the unanimous voting requirement for rules on the issuance of visas to third country nationals (EC Treaty art. 62(2)(b)).

[874] For an extensive analysis of the AFSJ and for further references to Article III-258, see Chapter 16 of this treatise.

[875] 22 December 2004 Council Decision, supra note 873.

[876] EC Treaty art. 63(1), (2).

Community action is subject to the unanimity provisions of EC Treaty Article 67(1). However, note that under Article 67(2) the December 2004 Council decision has partially shifted Article 63 to QMV.[877] The Constitution would complete the shift.

d. Immigration. European laws or framework laws (with a QMV Council approval) to provide for a common immigration policy are mandated by Constitution Article III-267.[878] This deviates from EC Treaty Article 63, whose corresponding measures[879] are subject to the unanimity provisions of EC Treaty Article 67. However, note that the December 2004 Council decision has partially shifted Article 63 to QMV.[880]

e. Cooperation in criminal matters. Constitution Article III-270(2) permits European framework laws, approved by a QMV decision of the Council, to establish minimum rules for cooperation on recognition of judgments and in police and judicial cooperation in criminal matters. This is a change from TEU Articles 30(1) and 31(1), in which legislation is subject to the unanimity requirements of TEU Article 34(2). Note, however, that the constitutional provision is subject to an "emergency brake" by which by which a Member State may refer the question to the European Council (for a unanimous decision) on grounds that a proposed EU law might "affect fundamental aspects of its criminal justice system."[881] This is a highly significant protection for the Member States, and it dramatically undercuts the effectiveness of the shift to QMV.

f. Definition of criminal offences. Legislation to define certain criminal offences having cross-border dimensions is permitted by Article III-271(1) and (2) of the Constitution. The Council would approve such

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[877] 22 December 2004 Council Decision, supra note 873. The Decision moves to QMV all decisions on measures aimed at balancing the efforts among Member States with regard to receiving and caring for refugees (EC Treaty art. 63(2)(b)). The Decision leaves in place the setting of standards and mechanisms for asylum (art. 63(1) and setting standards relating to temporary protection to displaced persons (art. 63(2)(a)).

[878] Constitution art. III-267(2), (4).

[879] EC Treaty art. 63(3).

[880] 22 December 2004 Council Decision, supra note 873. The Decision permits QMV decisions immigration measures relating to immigration and illegal residence, including repatriation of illegal residents (EC Treaty art. 63(3)(b)). The Decision does not change the unanimity requirement for measures on conditions of entry and residence, and standards for issuance of long-term visas and residence permits (art. 63(3)(a)).

[881] Constitution art. III-270(3).

legislation by a qualified majority vote. The corresponding TEU provision, Article 31(1)(e), subjects such legislation to the unanimity requirements of TEU Article 34(2). However, the Constitution once again provides an "emergency brake," permitting any Member State to move the question to the European Council for a unanimous decision. The only justification required for such a referral is the Member State's belief that a proposed EU law might "affect fundamental aspects of its criminal justice system."[882]

g. Eurojust. Constitution Article III-273(1) mandates EU legislation (with the Council approving by QMV) to determine the structure of Eurojust, its field of activities and its responsibilities. Under the Treaties this is governed by TEU Article 31(2), under which such activity is subject to the unanimity requirements of TEU Article 34(2).

h. Non-operational police cooperation. EU legislation on non-operational aspects of police cooperation is permitted under Constitution Article III-275(2), with such legislation to be approved by the Council on a qualified majority vote. Under TEU Article 30(1) all aspects of legislation relating to police cooperation are subject to the unanimity requirement of TEU Article 34(2).

i. Europol. Article III-276(2) of the Constitution requires EU legislation to determine Europol's structure and responsibilities. Once again the ordinary procedure would have the Council voting by qualified majority, whereas under TEU Article 30(2) all aspects of legislation relating to Europol are subject to the unanimity requirement of TEU Article 34(2).

2.6 **Areas of supporting, coordinating or complementary action**

The only voting change with regard to the Union's actions to support, coordinate or complement Member State activities is found in Constitution Article III-280, which addresses EU action to "contribute to the flowering of the cultures of the Member States." This provision authorises European laws and framework laws to create "incentive measures," and it further permits recommendations, all of which may be adopted by a qualified majority decision of the Council. The same activities under EC Treaty Article 151 specifically require unanimous Council approval.

[882] Constitution art. III-271(3).

2.7 External action

a. Decisions based on European Council requests. Constitution Article III-300(2) identifies certain European decisions in the field of common foreign and security policy (CFSP) that may be made by the Council through a qualified majority vote. This expands a list of QMV decisions permitted under Article 23(2) of the TEU, and it does so by providing for a qualified majority vote on all proposals presented by the Union Minister for Foreign Affairs. However, such proposals must be based on a request from the European Council, which would act unanimously. In addition, several safeguards under the TEU would be preserved in the Constitution. First, under Article III-300(2) as well as under TEU Article 23(2) a Member State might invoke "vital and stated reasons of national policy" and force referral of a Council matter to the European Council for a unanimous vote. Second, under Article III-300(1) and TEU Article 23(1) a Member State might abstain from a Council vote and declare its intention not to be bound by the decision. Finally, Constitution Article III-295(1) carries forward the mandate of TEU Article 13(1) that the general guidelines for the CFSP are to be determined by the European Council, acting unanimously.

b. Operating expenditures. Article III-313(2) permits the Council to decide that particular CFSP expenditures should not be charged to the EU operating budget, and if such a decision is made, the Council may decide how to allocate the expenditures among the Member States. Both Council decisions would be by QMV. EC Treaty Article 28(3) contains similar provisions, but the Council decisions must be unanimous.

2.8 Assessing the changes

A legitimate question is whether the identified items would provide for the loss of veto power in any areas of policy that are critical to Member State sovereignty. Brendan Donnelly and Lars Hoffmann have described the additional areas for QMV as "technical policy areas with cross-border implications . . . ."[883] Andreas Føllesdal comments that the move toward more QMV decision-making in the EU "requires a well-developed trust in other Europeans and officials," and that it is "unsurprising that the default procedure [QMV] does not apply in a number of key cases involving legislation on matters close to national sovereignty."[884]

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[883] Brendan Donnelly & Lars Hoffmann, All change or no change? Convention, constitution and national sovereignty, The Federal Trust Policy Brief No. 1, at 3 (Nov. 2003), available at http://www.fedtrust.co.uk/admin/uploads/PolicyBrief1.pdf.
[884] Føllesdal TFT, supra note 323, at 5.

The items described above indeed consist primarily of non-critical areas relating to the functioning of the EU and its current programs. However, several of the changes arguably would go beyond the category of technical adjustment. Foremost among these is the change to qualified majority voting in many aspects of the area of freedom, security and justice. The Member States would retain certain veto rights, but a significant shift would occur in the field of AFSJ.[885] The analysis in Chapter 16 examines these areas more closely. Another change of interest is the broadening of QMV on EU laws that support free movement of professional services. The loss of the limited unanimity requirement under EC Treaty Article 47(2) might be narrow in scope, but it arguably would affect Member State control over professional training and licensing. A third item of note relates to EU support for culture. The elimination of unanimity in this area might raise concerns in countries of particular cultural sensitivity, such as France. It is fair to predict that cultural affairs will not become a major EU program in the near future, if ever, but the field has the potential to be classified as more than mere technical cross-border policy.

It is also interesting to consider whether under the Constitution there could be future movement toward more qualified majority voting. As noted in Chapter 11,[886] Article IV-444 of the Constitution does provide a "simplified" amendment process, not found in the Treaties, to change the Council's voting procedures in any area. However, even this streamlined procedure would require a unanimous decision by the European Council and the right of any national parliament to block the change.[887] Each Member State would thus have two opportunities to exercise its veto over any attempt to change any aspect of unanimous Council voting to decision by QMV.

There are several additional articles in the Constitution that permit increased qualified majority voting on the Council, without the Article IV-444 amendment process. These *passerelle* provisions include the following:

> --Articles I-40(7) and III-300(3) permit additional QMV to be instituted in the common foreign and security policy.

[885] As noted in part 2.5 of this chapter, there is the theoretical possibility that the shift to QMV could be affected by the European Council's right to (unanimously) set strategic guidelines in matters of the AFSJ.
[886] See part 2 of Chapter 11 of this treatise.
[887] Constitution art. IV-444(3).

> --Article I-55(4) allows the establishment of more QMV in relation to the EU's multiannual financial framework.
>
> --Article III-269(3) provides for QMV to be expanded in certain matters of family law with cross-border implications.
>
> --Article III-422(1) permits additional QMV (participating Member States only) within a program of enhanced cooperation.

These bridging provisions are without precedent in the Treaties. However, each decision to permit more qualified majority voting on the Council requires a unanimous decision of the European Council. In the case of a program of enhanced cooperation, only those European Council members representing participating Member States will take part in the decision.

How should these proposed new areas of qualified majority voting be viewed? There would indisputably be some movement toward more QMV, and a positive comment is offered by Janis A. Emmanouilidis:

> The extension of decisions taken by majority in the Council of Ministers is a step forward for the enlarged EU's ability to act efficiently. It is also positive that decisions in the Council of Ministers taken on the grounds of the ordinary legislative procedure will as a rule be decided by qualified majority. Exceptions to this rule, when Council decisions are to be taken on the basis of unanimity, will have to be explicitly listed. In the end, this will not only substantially improve the enlarged EU's ability to act. It will also help prevent unjustified crossover deals, for example, between milk quotas and tax issues.[888]

Nevertheless, as the above analysis demonstrates, it is difficult to conclude that the Constitution's new areas of qualified majority voting would represent a major shift toward greater centralisation and away from the existing, critical reservations of Member State sovereignty.

3. NEW SUBJECTS FOR APPLICATION OF QMV

This section addresses those provisions in the Constitution that would create new areas of EU legislative activity subject to qualified majority voting

[888] Emmanouilidis, supra note 766, at 5.

on the Council.[889] Under the Treaties these new matters would either (1) fall outside the EU's competence, in which case action would not be possible, or (2) if relating to "the operation of the common market," be subject to EC Treaty Article 308. This provision permits legislation in new internal market fields outside the Community's specified powers, but always subject to a unanimous vote on the Council. The Constitution contains its own flexibility clause, Article I-18, and it likewise requires unanimous Council action to approve lawmaking on subjects not specifically covered in the document's text.[890] However, the new subjects identified below are addressed explicitly and affirmatively in the Constitution, and thus there would be no need to resort to the special requirements of Article I-18.

In instituting these new fields of EU activity, the drafters of the Constitution could have selected a unanimous voting requirement as a reflection of what the EC Treaty would have required under Article 308. But the Constitution was an opportunity to update the text of the Treaties and to provide for new subjects that fit within the current and anticipated needs of the Union, and in addressing these new fields the drafters decided that the more efficient procedure of qualified majority voting on the Council would be appropriate.

In the following list, unless there is a specific mention of the required voting method, the utilisation of qualified majority voting by the Council would stem from application of the Constitution's ordinary legislative procedure under Article I-23(3). Also note that one identified item (number 3.1(b) below) calls for a QMV decision by the European Council. All of the provisions mentioned below are articles of the Constitution unless otherwise noted.

3.1 Institutional and general Union matters

a. Accession to ECHR. Article I-9(2) requires the EU to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article III-325(8) specifies that the Council will act by qualified majority vote in negotiating international agreements, and the Convention

[889] For a list of the Constitution's new legal bases, both those permitting QMV decision-making and those requiring unanimity, see Piris, supra note 304, at 215 (Annex 4).

[890] Note that Article I-18 is not limited to matters of the common market, but covers all subjects addressed in Part III of the Constitution.

accession would be subject to that procedure. The Treaties do not contemplate this accession.[891]

b. New Council configurations. Article I-24(4) permits the European Council to decide by QMV the list of Council configurations other than Foreign Affairs. This coincides with the European Council's mandate under I-24(7) to determine by qualified majority vote the rotation of the Presidencies of Council formations. EC Treaty Article 203 requires a unanimous vote of the Council to set the Presidency rotations, but it does not address how configurations are to be created.

c. Representation on advisory committees. Under Article I-32 the Council may adopt European decisions regarding the types of representatives who will comprise the Committee of the Regions and the Economic and Social Committee. Adjustments are contemplated to reflect "economic, social and demographic developments within the Union." Actual composition of the committees – the number of members allocated to each Member State – is subject to a unanimous Council vote under Articles III-386 and III-389. The EC Treaty specifies the allocation of members by country, but it is silent as to adjusting the segments of society represented.

d. Citizen initiatives. Article I-47(4) requires European laws to determine the procedures and conditions for citizen initiatives. These initiatives are not contemplated in the Treaties.

e. Withdrawal agreement. If a Member State wishes to withdraw from the Union under Article I-60, subsection 2 of that provision requires the Council, acting by QMV, to conclude an agreement with the withdrawing state. There is no withdrawal provision in the Treaties.

f. Services of general economic interest. Article III-122 permits EU laws to establish principles and conditions relating to services of the general economic interest to be provided by the Union. Article 16 of the EC Treaty addresses these services, but there is no provision for any EU legislation on the matter.

g. Diplomatic and consular protection. Article III-127 permits EU laws to facilitate Member State diplomatic and consular protection of Union citizens in third countries. EC Treaty Article 20 contemplates such protection, but with no provision for EU legislation on the subject.

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[891] See discussion in part 3 of Chapter 7 of this treatise.

h. EU administration. European laws to support an "open, efficient and independent European administration" of the EU institutions are mandated by Article III-398(2). There is no precedent for this provision in the Treaties.

3.2 Internal market

Intellectual property. Article III-176 permits European legislation to create European intellectual property rights. This is a new field, not covered in the Treaties.

3.3 Policies in other areas

a. Space. European laws and framework laws to create a European space programme are permitted by Article III-254(2). Space is not a subject of the Treaties.

b. Energy. Article III-256(2) permits legislation to support a Union policy on energy. Although Article 3(u) of the EC Treaty mentions energy as one of a long list of Community activities, there are no specific provisions for legislation in the field.

3.4 Area of freedom, security and justice

Crime Prevention. Article III-272 permits EU laws to support Member State efforts in crime prevention. TEU Article 31 generally supports cooperation in criminal matters through judicial cooperation and through Eurojust.[892] However, it does not specifically mention crime prevention measures. Although this is best considered as a new matter that would be subject to the unanimity requirement under Article 308 of the EC Treaty, it could also be argued that it falls within the scope of TEU Article 31, in which case it would be subject to the general unanimity requirement of TEU Article 34(2). In any event, the Constitution's permission for legislation approved by a qualified majority vote on the Council is an extension of what is possible under the Treaties.

[892] TEU art. 31(1), (2).

3.5 **Areas of supporting, coordinating or complementary action**

a. Public health. Article III-278 permits the Union to take action complementary to national policies aimed at improving public health and preventing disease. In general, the terms of this article are carried over from EC Treaty Article 152, but two changes are noteworthy. First, where the Treaty refers only to the Community taking "measures" to contribute to public health, the Constitution specifically calls for European laws and framework laws pursue the public health goals. Second, the Constitution expands upon the Treaty's list of Community activities by mandating the Union to take action for the purpose of combating cross-border threats to health,[893] setting standards for medicines and medical devices,[894] and dealing with the use of tobacco and alcohol.[895]

Interestingly, health issues are described in Constitution Article I-14(2)(k) as part of the Union's shared competence, but at the same time health is identified in Article I-17(a) as a matter of supporting, coordinating or complementary action. This creates confusion as to the force of EU action – does it preclude Member State activity or not? Article I-12(2) grants the Union the first right to exercise its competence if an area is "shared," and such EU acts enjoy primacy over Member State. On the other hand, Article I-12(5) states that in areas of supporting action the Union's acts may not supersede Member State competence. Subsection 4 of Article III-278 attempts to resolve the inconsistency by cross-referencing Article I-14(2)(k) – and at the same time specifically excluding the application of Articles I-12(5) and I-17(a) – and stating that the actions described in that subsection will fall within the general rule for matters of shared competence. The items listed in subsection 4 include the new subjects of combating cross-border threats to health and setting standards for medicines and medical devices.

b. Tourism. Article III-281(2) provides for EU laws to promote European tourism. The EC Treaty mentions tourism in Article 3(u) as a subject of Community activity, but no separate provision is made for legislation in the field.

c. Sport. Article III-282(2) permits legislation to promote and support sporting activities. Sport is not mentioned in the Treaties.

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[893] Constitution art. III-278(1)(b).
[894] Constitution art. III-278(4)(d).
[895] Constitution art. III-278(5).

d. Civil protection. Article III-284 provides for Union legislation to support Member State cooperation in civil protection. Civil protection is mentioned in Article 3(u) of the EC Treaty, but its inclusion as a Community "activity" is not accompanied by any specific call for legislation.

e. Administrative assistance. Article III-285(2) allows for EU laws to assist Member States in improving their administrative capacity to implement EU law. There is no counterpart to this provision in the Treaties.

3.6 External action

a. European Defence Agency. Article III-311(2) permits the Council to adopt a European decision by qualified majority vote to define the "statute, seat and operational rules" of the European Defence Agency, a body not contemplated in the Treaties. It should be noted that the Council's ability to act by QMV is limited to the statute, seat and operational rules. Actual creation of the Agency and its mandate would be subject to the general unanimity requirement relating to Council decisions in the CFSP, set forth in Article III-300 of the Constitution. In addition, the Agency's birth would likely be the result of a unanimously adopted European Council policy guideline issued under Article III-295(2).

b. Permanent structured cooperation. Article III-312(2) permits a European decision of the Council, pursuant to a qualified majority vote, to establish a permanent structured cooperation in the area of defence and to determine which Member States will participate. In addition, Article III-312(3) contemplates a QMV decision (by Council members of participating states only) that a particular Member State qualifies to be engaged in the cooperation, while Article III-312(4) permits such a decision that would end a state's participation. Although the word "cooperation" is used frequently in the CFSP provisions of the Treaty on European Union,[896] the precise concept of "permanent structured cooperation" is not presented. This is a new construct under the Constitution, and the provision for a QMV Council vote is a departure from the general requirement of Article III-300 that Council decisions in the CFSP be unanimous, as well as the requirement of Article I-41(4) for unanimity in Council decisions on the common security and defence policy. Furthermore, it should be noted that the general establishment of a "common defence" is subject to a unanimous decision of the European Council under Article I-41(2).

[896] TEU articles 11-28.

c. Start-up fund. Article III-313(3) permits the Council to adopt a European decision as to how to provide EU budget appropriations relating to urgent policies under the common security and defence policy. The same provision permits a European decision on the creation and administration of a start-up fund for these purposes, which is to be made up of contributions by the Member States.

d. Urgent financial assistance. Under Article III-320 the Council may make European decisions when "the situation in a third country requires urgent financial assistance from the Union." There is no counterpart to this provision in the Treaties.

e. Humanitarian aid. Article III-321(3) mandates EU legislation to determine the framework within which the Union's humanitarian aid operations will be implemented. TEU Article 17(2) makes reference to "humanitarian and rescue tasks" as part of the CFSP, but a formal, ongoing program of humanitarian aid is not mentioned.

f. Aid Corps. A European Voluntary Humanitarian Aid Corps is contemplated in Article III-321(5), and European laws may determine its operating rules. This is an entirely new program.

g. Solidarity clause. Article III-329(2) permits a European decision of the Council to implement the solidarity clause of Article I-43. This clause requires the Member States to support any of them that becomes a victim of a terrorist attack or a natural or man-made disaster. While solidarity is mentioned as a political ideal in the Treaties, Articles I-43 and III-329 of the Constitution are unprecedented.

3.7 **No major shift in EU competences**

Many of the matters described in this section are intriguing, and a few may even be dramatic. Citizen initiatives and the Article I-60 withdrawal clause have been controversial. Expansion of EU activity into space, public health, tourism, sport and energy could potentially extend the impact of the Union in people's lives and imaginations. A European Peace Corps could help young people further identify with the EU as a whole. However, it is difficult to conclude that these activities would meaningfully expand the competences of the Union. Perhaps the most attention will be paid to those proposed changes in the EU's external activities, which are always matters of heightened national sensitivity. However, the common foreign and security policy even under the Constitution would generally be subject to unanimity

requirements, so Member States should have been assured that the approved new areas of QMV-based activity in external affairs would not lead to unapproved expansion into other areas.

Overall, it is fair to suggest that most of the Constitution's new subjects are technical institutional matters, subjects tied to existing Union activity, or fields that pose no threat to essential Member State sovereignty.

4. WHERE THE CONSTITUTION REQUIRES UNANIMITY

To conclude this analysis of voting requirements, it is useful to identify all of the points in the Constitution in which a unanimous vote, consensus or common accord – by all Member States or their representatives – would be required to enact EU legislation, make decisions or otherwise carry out EU law. Because these matters are rather numerous, the list of such provisions is placed in the **Addendum**. A review of these items reveals that most references are to decisions of the Council, for which unanimity is the exception rather than the rule. However, the addendum also identifies each instance in which the Constitution mentions a decision of the European Council, either specifying that it must be taken by consensus or unanimous vote, or not specifying a voting procedure, in which case the default consensus requirement of Article I-21(4) would govern.[897] In addition to acts of the two councils, the addendum identifies several provisions in which the unanimous consent of the Member State governments is specifically mandated.

The retention of unanimity is may be characterised as positive or negative,[898] depending on one's feelings about whether the European Union should be federal or intergovernmental in character. Nevertheless, unanimous decision-making remains an important feature of the Union landscape. As

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[897] Those few situations in which the European Council may vote by less than unanimity have been described in note 723, supra.

[898] Janis A Emmanouilidis has commented:

> In the case of the extension of majority decision-making in the Council of Ministers, it is unfortunate that the Constitution provides for a large number of areas where decisions will still be taken unanimously. Most prominent among these are tax harmonization, questions of social security, some areas of trade in services and intellectual property, some areas of environmental policy, anti-discrimination measures, European legislation on structural and cohesion funds (through January 1, 2007), some areas of immigration policy, and – with a few exceptions – the Common Foreign and Security Policy.

Emmanouilidis, supra note 766, at 7.

noted in previous discussions, the unanimity requirements in the Constitution in many ways offer the essential protection and preservation of Member State sovereignty within the EU. These provisions mark the brightest dividing lines between majoritarian-based Union authority and the ability of each Member State to prevent Union encroachment in matters of vital national interest.

5. UNANIMITY, QMV AND THE DIVIDING LINES

Some critics of the Constitution have complained of a wholesale shift of decision-making on the Council from unanimity to QMV. Section 2 of this chapter identifies all such changes – and there are a number – but if each of them represents the shift of one of the EU's dividing lines, what is their overall impact? Added together, it does not appear to be cause for any alarm. At best there is evidence of further incremental movement of the sort that has characterised the course of the EU throughout its history. But this development is both logical and measured, fashioned to make the Union more effective in light of today's challenges. It is not designed as an assault on the general competence or sovereignty of the Member States.

Similarly, the new areas of EU activity for which QMV is specified, as described in Section 3 of this chapter, appear to be carefully contained. Overall, they would enhance existing and related Union responsibilities. They certainly lack the drama of the changes instituted by the Maastricht Treaty. These new areas of activity demonstrate an attempt to continue the evolution of an organisation that seeks to respond to the times and meet the needs of its members. The proposed new competences for the Union represent a shifting of the dividing lines, but not in a manner that should strike fear in the hearts of anyone but the most dedicated of Euro-sceptics.

Part Four: The Subject Matters of EU Activity

In addition to its general principles, institutional descriptions and a procedural overview of Union activities, Part I of the Constitution describes the basic substantive division of responsibilities between the EU and its Member States. As previously noted, this division is framed in terms of exclusive Union competences, competences shared with the Member States and areas in which the Union may support, coordinate or complement the Member States.[899] Beyond this introduction, Article I-12(6) prescribes that "[t]he scope of and arrangements for exercising the Union's competences shall be determined by the provisions specific to each area in Part III." Part III is titled "The Policies and Functioning of the Union,"[900] and it incorporates the bulk of what has been contained in the EC Treaty and TEU. As a result, Part III contains two-thirds of the total text of the Constitution and provides the primary coverage of the Union's substantive activities.

Chapters 16 (the area of freedom, security and justice) and 17 (internal activities and external action) examine the subjects of EU activity. The AFSJ is addressed first, because it would be most significantly affected by the Constitution. Because of the great amount of text devoted to the Union's other internal activities and its external action, the analysis in Chapter 17 is generally limited to the constitutional articles that might impact the EU's dividing lines. The titles relating to internal and external action are:

> --Title III (Articles III-130 to III-285) – "Internal Policies and Action"

[899] See discussion in part 4 of Chapter 12 of this treatise.
[900] Constitution arts. III-115 to III-436.

--Title IV (Articles III-286 to III-291) – "Association of the Overseas Countries and Territories"

--Title V (Articles III-292 to III-329) – "The Union's External Action"

It should also be noted that certain titles in Part III of the Constitution are not addressed at all in these chapters. Those other titles address broad concepts and institutional matters that are dealt with in other parts of this treatise. They include:

--Title I (Articles III-115 to III-122) – "Provisions of General Application"

--Title II (Articles III-123 to III-129) – "Non-Discrimination and Citizenship"

--Title VI (Articles III-330 to III-423) – "The Functioning of the Union," including extensive provisions relating to the EU institutions, EU fiscal matters and the rules for enhanced cooperation

--Title VII (Articles III-424 to III-436) – "Common Provisions."

Chapter 16

The AFSJ – Justice and Home Affairs

The Constitution's area of freedom, security and justice (AFSJ) is presented in Articles III-257 to III-277. It comprises subject matter that is covered partly in the TEU (the Third Pillar of the Treaties) and partly in the EC Treaty.[901] The constitutional provisions have been described as a grouping that "brings together the already 'communitarized' provisions on border checks, asylum and immigration and on judicial cooperation in civil matters with the third pillar provisions on police and judicial cooperation in criminal matters."[902] As the ensuing analysis will demonstrate, the regrouping of the AFSJ provisions has ramifications well beyond mere organisational convenience. The effective transfer of the Third Pillar provisions into a field of ordinary legislative procedure also shifts unanimous Council decision-making to qualified majority voting, thus adjusting one of the EU's dividing lines in the direction of centralised administration.

The Constitution introduces the AFSJ in various sections of its Part I. In Article I-2 the term "justice" is included among the values that are to prevail in the Union. Article I-3(2) mandates the EU to "offer its citizens an

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[901] TEU arts. 29–42; EC Treaty arts. 61–69 (regarding visas, asylum, immigration and other matters). See also TEU art. 2 (describing as a Union objective the creation of an area of freedom, security and justice).

[902] Kokott & Ruth, supra note 116, at 1325. For a general analysis on the AFSJ, including the tensions between public order and individual rights within the European Union, see Hans Lindahl, Finding a Place for Freedom, Security and Justice: The European Union's Claim to Territorial Unity, 29 Eur. L. Rev. 461 (2004). For a history of the evolution of the AFSJ from its beginnings to its treatment in the Constitution, see Kuijper, supra note 575, at 609. Kuijper's topics include "The evolution of the Third Pillar and the intergovernmental method," "Transition to the Community method," "Variable geometry," and "Integration of the Schengen Acquis."

area of freedom, security and justice without internal frontiers." Article I-5(1) requires the Union to respect the Member States, "including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security." A more specific reference is found in Article I-14(2), where the AFSJ is designated as a matter of shared competence. In Part II of the Constitution there is a series of provisions under the title "Justice," and these establish the rights of the individual within the criminal justice system.[903] As described below, the primary substantive provisions are found in Article I-42 and in a series of articles in Part III.[904]

Under the Constitution the field would be subject to the ordinary forms of EU legislation, while the TEU provides for a separate set of instruments (common positions, framework decisions, decisions and conventions)[905] and the EC Treaty speaks of "measures" being adopted.[906] Specific comparisons between the constitutional provisions and those found in the Treaties will be made in the ensuing discussion. The Constitution's chapter on the AFSJ is divided into five sections, which will be analysed separately.

1. SETTING THE STAGE (I-42, III-257 – III-264)

The general provisions in Articles I-42 and III-257 to III-264 have their counterparts in Articles 29 to 42 of the TEU, which constitute the Third Pillar of the European Union, and in certain provisions of the EC Treaty relating to visas, asylum, immigration and other related matters.[907] The textual arrangement in the Constitution is quite different from the Treaties, and thus tracking the similarities and differences in the two documents involves an extended exercise in text-finding. To make the comparisons somewhat easier, the following analysis will describe each noteworthy constitutional provision as a separate item, immediately followed by a corresponding treaty provision, if any.

a. General description. The AFSJ is given a general introduction in Article I-42(1) of the Constitution. The specific Union task is to "constitute an area of freedom, security and justice" through the following activities:

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[903] Constitution arts. II-107 to II-110.
[904] Constitution arts. III-257 to III-277.
[905] TEU art. 34(2).
[906] EC Treaty arts. 61-67.
[907] EC Treaty arts. 61-69.

> (i) by adopting European laws and framework laws intended, where necessary, to approximate laws and regulations of the Member States in the areas referred to in Part III;
>
> (ii) by promoting mutual confidence between the competent authorities of the Member States, in particular on the basis of mutual recognition of judicial and extrajudicial decisions;
>
> (iii) by operational cooperation between the competent authorities of the Member States, including the police, customs and other services specialising in the prevention and detection of criminal offences.

This basic provision contains the seeds of the tension that is inherent in the entire matter of the AFSJ. On the one hand, Article I-42 mentions EU laws and the requirement of harmonisation of Member State laws. On the other hand, tribute is paid to "the competent authorities of the Member States," "mutual recognition" among the states, and "operational cooperation."

The TEU lacks an overview provision like Article I-42. However, the stage is set for the AFSJ in Article 2 of the TEU, which identifies as a Union objective the intention "to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime."

b. Member State legal traditions. Article III-257(1) mandates that Union action must take into account "the different legal traditions and systems of the Member States." There is no counterpart to this provision in the TEU or EC Treaty, but this new emphasis appears to be merely rhetorical.

c. Preventative measures. Article III-257(3) calls upon the Union to exert efforts to ensure security through "measures to prevent and combat crime, racism and xenophobia," as well as through measures to coordinate police and judicial cooperation, mutual recognition of criminal judgments and, as necessary, approximation of criminal laws. These goals and activities have their antecedent in Articles 29 and 31(1)(a) of the TEU. A number of the

objectives are covered in greater detail in Article III-270, which is discussed below.[908]

d. Strategic guidelines. Article III-258 requires the European Council to develop "strategic guidelines for legislative and operational planning within the area of freedom, security and justice." In accordance with the general Article I-21(4) requirement for European Council decisions, the adoption of these guidelines would require a consensus decision. This is a significant reflection of intergovernmentalism, and for each of the AFSJ matters addressed in the following analysis there is the theoretical potential that Article III-258 could undercut any use of qualified majority voting. Article III-258 has no direct antecedent in the TEU, although the European Council has in fact set strategic guidelines for the AFSJ,[909] and the Constitution may be seen as a codification of the institution's existing practice. Neither is the unanimity requirement a new development. TEU Article 34(2) generally requires that *all action* in the field of the Third Pillar must be adopted unanimously, albeit by the Council and not the European Council. Under TEU Article 42 a unanimous Council vote may also move EU competence into Title IV of the EC Treaty and change the requisite voting requirements.[910] Furthermore, EC Treaty Article 67(1) generally requires unanimity for decisions under Title IV of Part III of the treaty, while Article 67(2) permits a unanimous Council decision to shift certain decisions to QMV. In fact, the Council decision in December, 2004, did employ the Article 67(2) procedure to shift the majority of decisions under EC Treaty Articles 62 and 63 to QMV.[911] After the 2004 decision only a few areas remain subject to unanimity under Article 67(1).[912]

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[908] For an extended analysis of how the EU and its Member States can cooperate to fight crime within the constitutional constraints of the Treaties and the Constitution, see Elspeth Guild, Crime and the EU's Constitutional Future in an Area of Freedom, Security, and Justice, 10 Eur. L.J. 218 (2004).

[909] See, e.g., the European Council's Tampere Conclusions of 15 & 16 October, 1999, available at http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm, and their successor guidelines, the Hague Programme, of 5 November, 2004, available at http://ec.europa.eu/justice_home/doc_centre/doc/hague_programme_en.pdf.

[910] The Finnish Presidency in 2006, not wishing to wait for final ratification of the Constitution, stated its intention to pursue greater use of the "community method" in the Third Pillar. This approach would likely take place through the Article 42 procedure. See note 601 supra.

[911] 22 December 2004 Council Decision, supra note 873.

[912] The remaining subjects for unanimity are identified in notes 873, 877 and 880, supra.

e. Subsidiarity. Article III-259 requires national parliaments to ensure that EU legislation on the AFSJ respects the principle of subsidiarity. There is no corresponding provision in the TEU, and the constitutional section injects a reminder of the Union's limitations in this field. Sceptics might contend that subsidiarity is an aspiration without any force behind it, but intergovernmentalists are given some support for expecting the EU to proceed carefully, with the national parliaments monitoring each legislative move.

f. Cooperation. Article III-260 emphasises "mutual recognition" between EU and Member State authorities, while Article III-261 speaks of "operational cooperation" and "coordination" among the Member States. These are reflective of TEU Article 34(1), which states that "Member States shall inform and consult one another within the Council with a view to coordinating their action." The treaty provision also urges the states to "establish collaboration between the relevant departments of their administrations." As with the principle of subsidiarity, mutual recognition and cooperation may prove to be toothless concepts, but the Member States are offered grounds to argue that they must play a significant role in AFSJ legislation.

g. National responsibility. According to Article III-262, EU efforts in the AFSJ may not affect the ultimate responsibility of each Member State "with regard to maintenance of law and order and the safeguarding of internal security." This is a direct carryover from Article 33 of the TEU, and it maintains the Third Pillar's emphasis on national sovereignty.

h. Administrative cooperation. Article III-263 permits the Council to adopt European regulations to "ensure administrative cooperation" among the Member States and between the states and the Commission in the areas covered by the AFSJ chapter. These regulations would be adopted by the Council acting on a qualified majority vote, and this represents a procedural change. TEU Article 29 mentions various forms of cooperation, and Article 34 provides for the Council to take a variety of measures to achieve these objectives.[913] Under the treaty the Council must act unanimously.

i. Legislative initiative. In one of the relatively rare instances in which the proposing of EU legislation is not reserved to the Commission, Article III-264 states that Union acts pertaining to judicial or police cooperation may be initiated by one-fourth of the Member States.[914] This appears to weaken the

[913] TEU arts. 34(1), 34(2).

[914] See also Constitution arts. I-34(3), I-42(3) (referring to the Member States' right of legislative initiative).

rights of individual states, because Articles 34(2) and 42 of the TEU permit a single Member State to initiate a Council decision. If individual states were to lose this right, a measure of power would transfer to the only other entity empowered to initiate legislation – the Commission. Possibly increasing the loss to the Member States is the fact that under the treaty a Council decision on judicial or police cooperation must be taken unanimously, whereas under the Constitution the general rule would be qualified majority voting. However, the discussions below also identify certain constitutional requirements for unanimous decision-making, as well as "emergency brakes" that permit reference of legislative matters to the European Council for a unanimous vote.

j. Legislative instruments. Under Article I-33 the AFSJ is to be dealt with through use of the normal six EU legislative instruments. In contrast, under TEU Article 34(2) EU activity in the field is subject to its own set of instruments, including common positions, framework decisions, decisions, and conventions. While the Constitution's approach may be more easily understood, it does not suggest any substantive movement away from or toward Member State influence within the Union.

k. Recapping the major changes. From the above comparisons it can be noted that the general treatment of the AFSJ in the Constitution contains several significant changes from the TEU. First and foremost, the Pillar structure of the Treaties would be abandoned, and all AFSJ activity under the Constitution would take place as the ordinary working of the European Union. Second, under the TEU Article 34 all EU legislation and decisions in the field must be adopted unanimously by the Council. In contrast, the Constitution would require unanimity only for certain guidelines adopted by the European Council (but see the comment below). Third, the Constitution would permit one-fourth of the Member States to initiate AFSJ legislation, while the TEU permits any single Member State to do so. Fourth, the Constitution would do away with the special set of legislative instruments that the TEU specifies for this field. Finally, as analysed in part 5 of Chapter 13, the Constitution would expand the jurisdiction of the European Court of Justice within the Third Pillar.

The reduction in the unanimity requirement for legislation and decision-making in the field of AFSJ might signal a turn in the direction of significantly more Union activity in this area. However, the impact of Constitution Article III-258 remains to be seen. If new legislation is dependent on the European Council unanimously approving "strategic guidelines for legislative and operational planning," there remains at least the

theoretical possibility that new AFSJ activity could be blocked at the policy-setting stage.[915] But the possibility of a Member State to use its seat on the European Council to hold up further AFSJ development need not be seen as a vital safeguard. As this discussion has demonstrated, and as further illustrated in the following analyses, there would remain other, more accessible protections for the Member States.

2. BORDER CHECKS, ASYLUM AND IMMIGRATION (III-265 – III-268)

Article III-265 requires the EU to develop open border policies relating to movement of persons within the EU, with a goal of "the absence of any controls."[916] Under Article III-266 the Union is also expected to develop a common asylum policy, while III-267 calls for a common approach to immigration. Article III-268 states that in all of these EU programs the Union must seek "solidarity and fair sharing of responsibility" among the Member States, including the financial costs. While Article III-268 is unprecedented, Articles III-265 to III-267 are based on EC Treaty Articles 61 to 69, as follows:

--Article III-265 (border controls) corresponds with Article 62,
--Article III-266(1), (2) (asylum) corresponds with Article 63(1), (2),
-- Article III-266(3) (sudden inflows) corresponds with Article 64(2), and
--Article III-267 (immigration policy) corresponds with Article 63(3).

Due to these correlations, much of the substance of the Constitution may be described as a carryover from the EC Treaty. However, the treaty contains a number of transitional articles whose time periods have by now expired.[917]

More significant is the fact that in the AFSJ the Constitution's general change from unanimity to qualified majority voting on the Council affects these provisions, even though the Constitution's articles are taken not from the unanimity-based Third Pillar of the TEU. Article 67 of the EC Treaty also generally requires the Council to act unanimously under Articles 61 to 69[918] unless the Council unanimously decides to apply QMV to a particular

[915] The possible impact of Article III-258 is introduced for consideration in section 1.1(d) of this chapter and in section 2.5 of Chapter 15.
[916] Constitution art. III-265(2).
[917] See, e.g., EC Treaty arts. 61(a), 62, 63, 67(1).
[918] These provisions comprise EC Treaty Part III, Title IV.

matter.[919] A Council decision in December, 2004, did indeed shift most (but not all) decisions under Articles 62 and 63 to QMV,[920] but the Constitution might well represent a substantial broadening of majority voting.

Interestingly, Articles III-265 to III-267 contain protections for Member States not found in the EC Treaty or the TEU. Article III-265(3) states that despite the goal of common border controls the Member States retain the competence to determine the "geographical demarcation of their borders, in accordance with international law." Article III-267(5) declares that an EU-wide immigration policy "shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed." These provisions represent at least a clarification of Member State rights, and they arguably strengthen the position of the members. Beyond this, the "fair sharing" requirement of Article III-268 reflects a newly articulated ideal of parity among the Member States in these vital matters of national sovereignty and identity. It is unclear whether these gains would offset the intended losses in unanimous voting.[921]

3. JUDICIAL COOPERATION IN CIVIL MATTERS (III-269)

In the field of judicial cooperation in civil matters, Article III-269 permits the EU to enact a variety of laws or framework laws to promote cooperation.[922] These measures may include requirements for the approximation of Member State laws, but any policies affecting family law must be unanimously adopted by the Council.[923] Article III-269 is based upon Article 65 of the EC Treaty, a provision that is included in Title IV of the treaty along with visa and asylum policies.[924] Also, EC Treaty Article 67(5) permits the Council to act by QMV in matters governed by Article 65, "with the exception of aspects relating to family law." Except for the additions

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[919] See EC Treaty art. 67(2).

[920] 22 December 2004 Council Decision, supra note 873, art. 1. The changes are described in part 1.1 of this chapter, in the text accompanying notes 935-38, and are specifically identified in notes 873, 877 and 880, supra.

[921] Note again that the final position of these dividing lines could theoretically be affected by the role of the European Council in setting strategic guidelines. See discussions in sections 1.1(d) and 1.1(k) of this chapter and in section 2.5 of Chapter 15.

[922] Constitution art. III-269(1), (2).

[923] Constitution art. III-269(3).

[924] The title in which EC Treaty Article 65 is found is Title IV of part three of the EC Treaty. EC Treaty arts. 61-69.

mentioned below, the Constitution's provision is consistent with its treaty antecedents.

The following goals for EU legislation are included in Article III-269(2) as additions to the material carried over from EC Treaty Article 65:

--"effective access to justice,"
--"the development of alternative methods of dispute settlement," and
--"support for the training of the judiciary and staff."

It should also be noted that the general change from unanimity to qualified majority voting on the Council with regard to the AFSJ is not relevant to this section, because Article III-269 is based on EC Treaty Article 65, for which Article 67(5) does not generally require unanimity.[925] Thus, the Constitution's adaptation of the EC Treaty provision appears intended to carry the existing regime forward, while amplifying its scope in non-controversial areas.

4. JUDICIAL COOPERATION IN CRIMINAL MATTERS (III-270 – III-274)

The EU is granted wide authority in Articles III-270 to III-274 to legislate the details of judicial cooperation in criminal matters, including mutual recognition of judgments, harmonisation of laws relating to cross-border crimes, and coordinated crime prevention programmes. However, there are a number of limitations on EU competence. First, certain Union acts must receive unanimous approval on the Council.[926] Second, under Articles III-270 and III-271 a Member State that believes that a proposed European framework law – one that can be approved by a QMV Council decision – might "affect fundamental aspects of its criminal justice system" can force the proposal to be referred to the European Council, where unanimous approval will be required.[927] Whether subject to a required unanimous vote or an

[925] Note again that the unanimity requirement for the European Council to set strategic guidelines under Constitution Article III-258 could theoretically affect the Council's ability to create legislation by QMV. See discussions in sections 1.1(d) and 1.1(k) of this chapter and in section 2.5 of Chapter 15.

[926] Constitution arts. III-271(1) (regarding expanding the list of serious cross-border crimes), III-274(1) (establishment of the European Public Prosecutor's Office).

[927] Constitution arts. III-270(3), III-271(3). This procedure in the AFSJ realm has been referred to as an "emergency brake." Grevi, supra note 402, at 10. Jean-Claude Piris comments that the emergency brake is accompanied by an "accelerator" provision to avoid a stalemate on the proposed framework law. If certain time periods have expired without satisfactory action, Member States wishing to proceed with the

"emergency brake" referral to the European Council, these matters of EU competence are significantly impacted by intergovernmental protections. A third limitation on the Union is that Member States in some instances may adopt higher levels of protection of individual rights than are mandated by EU law.[928] Fourth, EU promotion of crime prevention is merely supportive of national action and may not require approximation of Member State laws.[929] Fifth, Article III-273 calls for European laws to determine the structure and operations of Eurojust, an office that supports and coordinates, but does not supplant, the efforts of national investigating and prosecuting authorities. Finally, Article III-274 permits the Council to establish a European Public Prosecutor's Office, but it must act unanimously in establishing the office and in granting extended powers to the prosecutor.[930]

The provisions of Articles III-270 to III-274 are broad and richly detailed in comparison to their predecessors in the TEU. Article 31 of the TEU is the antecedent, but it is much less developed. Article 31(1) lists five aspects of EU action on judicial cooperation. Its constitutional counterpart is Article III-270, which is more extensive. A closer correlation is found in Article 31(2), whose references to Eurojust have essentially been transferred into Article III-273.

In addition to the broader language of Article III-270 on judicial cooperation, the Constitution offers three related provisions that would expand somewhat on the treaty. First, Article III-271 describes an ambitious EU programme of developing uniform standards for crimes with a cross-border dimension, such as drug trafficking, trafficking in persons and money laundering. This provision is based on TEU Article 29, which speaks generally of "preventing and combating" such activities, and on Article 31(1)(e), which calls for action including "progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking." The Constitution's approach, if not new, is more descriptive and vigorous. The second expansion is Article III-272, which authorises EU legislation "to promote and support the action of Member States in the field of crime prevention," albeit without the right of requiring harmonisation of national laws. TEU Article 29 speaks of crime prevention as a goal, but with no legislative program described. The third development is Article III-274,

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proposed framework law may do so under a program of enhanced cooperation. Constitution arts. III-270(4), III-271(4). See Piris, supra note 304, at 169.

[928] Constitution art. III-270(2).

[929] Constitution art. III-272.

[930] Constitution art. III-274(1), (4).

which anticipates creation of a European Public Prosecutor's Office from Eurojust. While Eurojust is described in TEU Articles 29 and 31, the prosecutor is not mentioned. Interestingly, the Constitution demands unanimous Council approval to establish the prosecutor's office and to extend its mission,[931] an approach that is consistent with the Treaties. For example, if a prosecutor were to be established under the Third Pillar, the action would be subject to the unanimity requirements of TEU Article 34(2). Unanimity would also pertain to any of the constitutional developments in the field of AFSJ that go beyond the precise power conferred upon the Union by the Treaties.

One example of a shift away from Member State control is that under Constitution Article III-273 any laws relating to Eurojust may be approved by the Council voting by qualified majority, while similar laws under the Third Pillar would require unanimity under TEU Article 34(2).

As a reflection of the relative lack of detail in TEU Article 31, all of the areas identified above as requiring unanimous Council action or offering special protections to the interests of the Member States are innovations in the Constitution. But the Constitution's selective use of the unanimity requirement may be somewhat deceiving. Since Article 31 is part of the AFSJ title in the TEU, it is subject to the general requirement of TEU Article 34 that all EU legislation and decisions in the field must be adopted unanimously by the Council. Under the Constitution the default rule for Council voting in the field of AFSJ is the qualified majority vote. Thus, the specific constitutional provisions requiring unanimity may be seen not as new restrictions on AFSJ activities, but as the retention of some unanimity in the face of a general move to QMV.[932]

5. POLICE COOPERATION (III-275 – III-277)

Under Article III-275 the EU may enact legislation to require cross-border police cooperation,[933] but such laws relating to *operational* cooperation are subject to unanimous vote on the Council.[934] Article III-276 allows the Union to create Europol to assist in these efforts, but national parliaments are

[931] Constitution art. III-274(1).
[932] Note again the theoretical possibility of strategic guidelines from the European Council under Article III-258. See discussions in sections 1.1(d) and 1.1(k) of this chapter and in section 2.5 of Chapter 15. If such guidelines were to be restrictive on future legislation, the opportunities for QMV decisions on new legislation would be reduced.
[933] Constitution art. III-275(1).
[934] Constitution art. III-275(2).

expected to monitor its activities, it must work with Member State authorities, and any "application of coercive" measures is reserved to national authorities. Last, Article III-277 provides that any EU law permitting police officials from one Member State to operate in another Member State is subject to unanimous vote on the Council.

The provisions of Article III-275 are drawn from Article 30(1) of the Treaty on European Union, Article III-276 is a restatement of TEU Article 30(2), and Article III-277 is a carryover from TEU Article 32. In general, the constitutional provisions mirror the treaty provisions, although the Constitution eliminates a five-year time period mentioned in the treaty,[935] and the Constitution contains updated language referring to information collection, analysis and exchange.[936] Significantly, areas of police cooperation other than operational cooperation could be decided by the Council by QMV under Constitution Article III-275, where TEU Article 30(1) requires unanimity for all forms of cooperation. Furthermore, EU laws relating to Europol would be subject to a QMV Council vote under the Article III-276, in contrast to the unanimity required under TEU Article 30(2).

The primary wording changes in the Constitution are those described above that require unanimity on the Council or protect Member State competences.[937] However, as noted in the previous section, TEU Articles 30 and 32 are already subject to unanimous voting on the Council. Thus the Constitution's "new" references to unanimity are actually a means of maintaining the status quo in the subject provisions.

6. THE SIGNIFICANCE OF THE AFSJ

Several recent commentaries have addressed the importance of the European Union's continuing development as an area of freedom, security and justice. A supportive argument is presented by Dario Melossi, who notes the global threats confronting the EU, such as "the evil-doing of wayward States, . . . domestic enemies, terrorists, *narcotraficantes*, common criminals and, of course, 'undocumented' or 'irregular' migrants," and he contends:

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[935] TEU art. 30(2).

[936] Constitution art. III-276(2).

[937] Furthermore, any future legislative activity in the field of police cooperation could theoretically be limited by strategic guidelines emanating from the European Council, which under Article III-258 must act unanimously. See discussions in sections 1.1(d) and 1.1(k) of this chapter and in section 2.5 of Chapter 15.

> In view of such global developments, we Europeans have to proceed with the greatest urgency and decision toward the creation of an actual common area of 'freedom, security and justice', but this should not be an area of conversation among a few government functionaries preoccupied with defending what has been named the 'fortress Europe'. Rather, it should be a crucial part of that construction, or indeed 'constitution', of a European democracy that is increasingly becoming the order of the day.[938]

On the other hand, as we are reminded by Elspeth Guild, one must not forget the fact that the AFSJ is a field with an inherent tension built into its very fabric. First, Constitution Article I-42(1)(a) speaks of EU law "intended, where necessary, to approximate laws and regulations of the Member States." This is a Euro-centric component that anticipates a "consolidation of power."[939] In contrast, Article I-42(1)(b) speaks of promoting "mutual confidence" among the Member States and "mutual recognition" of their judicial and extrajudicial decisions. Likewise, Article I-42(1)(c) speaks of "operational cooperation" between the Member States. These are components that emphasise "the sovereignty of the Nation State as a territory, people, and system of governance enclosed by borders and required by [Constitution Article I-5]."[940]

Finally, Pieter Jan Kuijper injects a note of pessimistic realism into the discussion of the AFSJ, by describing the diverse ways in which several states have participated in EU programs.[941] These have included Member States who have opted out of certain activities, as well as non-members who have opted in. Kuijper, writing prior to publication of the draft Constitution, comments:

> Variable geometry is *not* a success. The non-participants may be free riders in the decision-making, and may not even intend to participate. The fact that they must declare their intentions is not sufficient. Even combined with qualified majority, the Member States have a right to opt to have, in practice, too much influence on decision-making when the others attach importance to their participation. In the field of external relations variable geometry creates untold technical

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[938] Dario Melossi, Security, Social Control, Democracy and Migration within the 'Constitution' of the EU, 11 Eur. L.J. 5, 21 (2005).
[939] Guild, supra note 908, at 219.
[940] Id.
[941] Kuijper, supra note 575, at 620-23.

> complications which will make the Union's international life only more miserable.[942]

7. THE AFSJ AND THE DIVIDING LINES

While discarding the Pillar structure of the Treaties, the drafters of the Constitution proposed more than the conversion of the AFSJ into an activity subject to the new set of ordinary legislative instruments. They offered two more profound consequences: First, a shift from unanimity to QMV at the Council was to be incorporated into this field. Second, the jurisdiction of the Court of Justice in the AFSJ would be significantly expanded. Together, these developments would be potentially far-reaching – a relatively profound shifting of the EU's dividing lines. There are safeguards in the Constitution, but one should acknowledge that its most significant substantive legacy would have been found here.

Was this really cause for alarm? Were the sceptics correct in seeing a profound movement toward Brussels? To respond to these questions, we should reflect on the subject matter represented in the area of freedom, security and justice. As discussed in Section 6 of this chapter, the authors of the Constitution did not fabricate a need for greater EU efficiency and oversight in these matters. Rather, the need already exists, and it is urgent. The arguments for greater integration and coordination in the AFSJ predated the Constitution, and the case grows stronger each year. There is little doubt that absent a new constitutional document the representatives of the Member States would be pursuing these initiatives through EU legislation or treaty amendment, or, failing that, cooperation outside the Union mechanisms. In other words, the drafters of the Constitution were merely responding to the vital requirements of the Member States. Yes, it proposed a shift in the EU's dividing lines, but the shift would have been happening in any event.

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[942] Id. at 626.

Chapter 17

The Union's Internal Activities and External Action

The most extensive section of Part III of the Constitution is Title III, which consists of 186 articles governing the EU's "internal policies and action."[943] Each of the five chapters in Title III addresses a distinct class of subject areas. Chapter I covers the internal market and the free movement of goods, persons, capital and services throughout the Union.[944] Chapter II deals with the EU's economic and monetary policies, including its common currency, the euro.[945] Chapter III is a basket of provisions aptly titled "policies in other areas," and it includes employment, social policy and agriculture, among others.[946] Chapter IV addresses the area of freedom, security and justice,[947] which we have already examined in the previous chapter of this treatise. Chapter V of Part III[948] concludes the title with a diverse set of subjects gathered under the rubric "areas where the Union may take coordinating, complementary or supporting action."[949] With the exception of of the AFSJ, the Constitution's would primarily have rearranged the internal market provisions of the Treaties without shifting the dividing lines between EU and Member State competences.

In Title V of Part III the Constitution addresses the Union's "external action."[950] Its seven chapters govern subjects as diverse as the common foreign and security policy (which includes defence), common commercial

[943] Constitution arts. III-130 to III-285.
[944] Constitution arts. III-130 to III-176.
[945] Constitution arts. III-177 to III-202.
[946] Constitution arts. III-203 to III-256.
[947] Constitution arts. III-257 to III-277.
[948] Constitution arts. III-278 to III-285.
[949] Constitution arts. III-278 to III-285.
[950] Constitution arts. III-292 to III-329.

policy, cooperation with third countries, humanitarian aid, restrictive measures and international agreements.

The following analysis will begin with a review of the non-AFSJ chapters of Title III, but the discussion will be limited to those few provisions in which the dividing lines would be affected. Thereafter, a similarly brief review of Title V will address only those matters of external action that are relevant to the dividing lines theme.

1. INTERNAL POLICIES AND ACTION (III-130 – III-285)

1.1 **The internal market** (III-130 – III-176)

From its earliest days and continuing to the present, one of the principal successes of the European Union has been its creation and management of the internal market.

a. The Constitution's new approach to the internal market

Articles I-11 to I-18 of the Constitution offer an overview of the EU's competences in this field, and in Part III the internal market is further introduced in Articles III-130 to III-132. Notably the EU is generally given "shared competence" in managing the internal market and its "four freedoms."[951] The Constitution would grant the Union exclusive competence in the customs union and in competition rules "necessary for the functioning of the internal market."[952] As previously discussed, in areas of exclusive competence only the Union may act,[953] while in matters of shared competence the EU is free to act, and Member States may legislate only to the extent the Union has not done so.[954] In all cases the authority granted to the EU includes the right act within the Union and externally as necessary to support the

[951] Constitution arts. I-14, III-130 to III-160, III-170 to III-176. The freedoms include free movement of persons, goods and capital, as well as services and the related right of establishment. See Constitution arts. III-133 to III-136 (regarding free movement of persons), arts. III-137 to III-143 (regarding freedom of establishment), arts. III-144 to III-150 (regarding freedom to provide services), arts. III-151 to III-155 (regarding free movement of goods – customs union) and arts. III-156 to III-160 (regarding free movement of capital). For a review of recent case law development of the four freedoms, see Spaventa, supra note 386.
[952] Constitution art. I-13(1).
[953] Constitution art. 12(1).
[954] Constitution art. I-12(2).

Union's internal programmes.[955] Under the Constitution the Member States would take an active role in the functioning of the internal market, and the Constitution's delineation of competences establishes the basic parameters for both EU and Member State action.

The EC Treaty lacks an introductory section like that of Part I of the Constitution, and a delineation of exclusive and shared competences is not presented. However, certain broad principles are stated in the treaty. Article 2 explains that the Community "shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote [economic development and other goals] throughout the Community." However, it is not made clear whether the Community's task is exclusive or shared with the Member States. Also without reference to exclusivity, Article 3 sets out a long list of tasks for the Community, all of which are dealt with in specific treaty articles, and all of which will be discussed below. Article 3 also refers to approximation of Member State laws as part of the activity "required for the functioning of the common market."[956] Article 4 mentions activities of the Member States as well as the Community in relation to adoption of a Community economic policy "which is based on the close coordination of Member States' economic policies."[957]

EC Treaty Article 5 does not refer to the internal market or any other subject area, but it most explicitly refers to competences. It begins with an attribution principle that affirms the Community's mandate to "act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein." It then states that where activities "do not fall within its exclusive competence" the Community must abide by the principle of subsidiarity, and in any event it must adhere to the concept of proportionality. However, as noted, there is no list of which activities – whether related to the internal market or not – actually are exclusive to the Community. The fact that the Constitution fills in this gap arguably represents a significant improvement. On the other hand, one might contend that the Constitution

[955] Constitution art. I-13(2).
[956] EC Treaty art. 3(1)(h).
[957] EC Treaty art. 4(1), (3). There are several other overview provisions in the EC Treaty. Article 6 states environmental protection to be a Community goal. Article 14 mentions the broad objective of establishing the internal market. Article 15 anticipates temporary derogations from internal market policies to take into consideration the special economic needs of certain Member States. Articles 297 and 298 commit the Member States to work to preserve the internal market even in the face of wars and other threats to internal security.

would also remove an element of flexibility permitted under the Treaties, replacing it with more clarity but also more rigidity.

Beyond the matter of competences, a notable stylistic change is that the Constitution alters the order of topics relating to the internal market. The EC Treaty addresses first the free movement of goods, then the free movement of persons, services and capital. The Constitution deals first with the movement of persons and services, second the movement of goods, and third the movement of capital and payments. No explanation for this change is offered, but it is fair to say that the free movement of goods – so vital to the creation of the internal market – is fully developed, while many aspects of the movement of persons and services are still evolving. The drafters of the Constitution simply took the hottest topic and moved it to the front of the line.

b. Specific changes of interest relating to the internal market

(1) *Multi-state social security calculations.* With respect to the free movement of workers within the European Union, Articles III-133 to III-136 of the Constitution correspond to Articles 39 to 42 of the EC Treaty. Both documents provide the Community or EU with broad authority to override Member State law as necessary to promote worker mobility. However, within this broad mandate Article 42 of the treaty always requires a unanimous Council vote in relation to multi-state social security calculations. In contrast, Article III-136(2) of the Constitution starts with a presumption that decisions on such calculations will be taken by QMV at the Council. However, the Constitution also provides an "emergency brake" by which a Member State fearing potential disruptions to its social security system may move decisions in the field from the Council to the European Council, where unanimity would be required. Thus, a dividing-line shift would occur, but it would be carefully contained.

(2) *Professional licensing.* Articles III-137 to III-143 permit wide-ranging EU activity to ensure that nationals of one Member State may set up establishments or engage in self-employment in other Member States. These provisions mirror EC Treaty Articles 43 to 48, plus Article 294. In general, the two documents offer the Community/Union the same authority, and the Member States are granted the same protections. A minor difference is that Article 47 of the treaty provides for a unanimous Council decision "on directives the implementation of which involves in at least one Member State amendment of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons." The Constitution does not contain this safeguard. All decisions

under the Constitution regarding right of establishment are to be taken by qualified majority vote of the Council, as are all decisions under the EC Treaty except the one identified here. The Constitution thus offers a small shift from unanimity to qualified majority vote with regard to the licensing of professionals, permitting QMV decisions of the Council to create more uniformity in this field at the expense of an objecting Member State.

(3) *Free flow of capital.* In the Constitution, Articles III-156 to III-160 establish EU competence in supporting a free flow of capital, and they are very similar to Articles 56 to 60 of the EC Treaty. However, there are two differences of note.

First, Article III-160, contemplates measures to combat terrorism by permitting the freezing of assets of individuals or groups. The counterpart provision in the treaty is Article 60(1), which (by cross-reference to Article 301) refers broadly to restrictions on movements of capital and payments to and from third countries in matters described in Article 301 as "relating to the common foreign and security policy." The Constitution's specific grounds for restrictions (terrorism) and the means it provides (freezing assets) wold constitute a substantial narrowing of EU's options compared to those under the treaty.[958]

The second change relates to the ability of a Member State to act unilaterally if the EU has not done so. Article 60(2) of the treaty permits a Member State "for serious political reasons and on grounds of urgency" to take action against a third country to restrict capital and payment flow. However, the Council by qualified majority vote may override the state's action. The counterpart provision in the Constitution is found in Article III-158(4), which allows a Member State to request a European decision of the Council approving unilateral action by the state. Such decision must be taken unanimously, and the Constitution does not explain what happens if the Council fails to approve the request. Presumably, the Member State will not be permitted to act. Thus, where the EC Treaty makes it clear that unilateral Member State action is permitted, subject to an overriding decision by the Council, the Constitution implies that state action is not allowed. This may be seen as a loss of national competence – a movement of one dividing line away from the Member States.

[958] Note that Article III-159 of the Constitution does preserve the EC Treaty Article 59 possibility of restrictions on movement of capital to or from third countries if there is a threat to the EU's economic and monetary union.

(4) *EU intellectual property rights.* The "Common Provisions" in Articles III-172 to III-176 discuss the means by which Member State laws must be harmonised to support the internal market. The substance of these articles is taken relatively intact from EC Treaty Articles 94 to 97, but one significant addition is Article III-176, which permits the Union to create EU intellectual property rights and to provide for Union-wide protection of such rights. Article III-176 has no precedent in the Treaties, and this represents a proposed expansion of Union competences in a matter vital to cross-border commerce. Interestingly, Article III-176 reflects some sensitivity to national interests by requiring a unanimous Council vote in regard to establishing "language arrangements" relating to European IP rights.

(5) *Tax law harmonisation – the change that didn't happen.* It is noteworthy that an early draft of the Constitution contained a provision that would have allowed qualified majority voting at the Council on certain aspects of company tax law harmonisation. Any form of authority on direct taxation has to this point been outside the EU's competence, with the Union being limited to indirect measures such as the prohibition of tax discrimination between the Member States. The harmonisation proposal coming out of the Convention was ultimately rejected by the IGC at the insistence of the United Kingdom and others. Giovanni Grevi has commented that tax harmonisation constitutes a "red line" that has been "drawn by a few Member States,"[959] and under the Constitution this dividing line would stay in place.

1.2 **Economic and Monetary Policy** III-177 – III-202)

The economic and monetary union, popularly characterised by Europe's common currency, is a significant and highly visible accomplishment of the European Union. The Constitution's chapter on EMU has its counterpart in EC Treaty Article 4 and Articles 98 to 115, and the Constitution offers no significant EMU changes that would affect the EU's dividing lines.

1.3 **Policies in other areas** (III-203 – III-256)

a. Overview of the policies

Ten separate fields are collected in this chapter of the Constitution. The constitutional provisions and their EC Treaty counterparts are:

[959] Grevi, supra note 402, at 10.

--employment (III-203 – III-208; EC Treaty Arts. 125 – 130),
--social policy (III-209 – III-219; TEC 136 – 148),
--economic, social and territorial cohesion (III-220 – III-224; TEC 158 - 162),
--agriculture and fisheries (III-225 – III-232; TEC 32 – 38),
--environment (III-233 – III-234; TEC 174 – 176),
--consumer protection (III-235; TEC 153),
--transport (III-236 – III-245; TEC 70 – 80),
--trans-European networks (III-246 – III-247; TEC 154 – 156),
--research, technological development and space (III-248 – III-255; TEC 163 – 173), and
--energy (III-256; no direct EC Treaty counterpart).

These fields are diverse, and yet they share certain characteristics. First, all of them except employment policy are areas of shared competence under Article I-14(2), meaning that the Member States would be permitted to act only to the extent the Union would choose not to. Second, they offer the prospect of more EU activity than in those areas in which the Union is limited to "supporting, coordinating and complementary" action. Third, these subjects were apparently not viewed as natural components of the internal market, the EMU or the AFSJ. If they had been, they would likely have been included in those chapters. In short, these provisions are something of a constitutional hotch pot.

As indicated above, most of these activities have direct antecedents in the EC Treaty, and on the surface the dividing lines between EU action and Member State activity do not appear to be much affected in the transfer of these matters from one document to the other. However, there is a significant "catch" here. As noted, all of these matters except employment are defined in the Constitution as areas of shared competence, meaning that Member States may act only if the EU does not.[960] Where the Union takes steps, the states are to abstain. Since the EC Treaty never defines shared competence as such, it seems logical that under the treaty a Member State retains the right to act even after the EU has stepped in, so long as its acts are not contrary to the Union legislation. This interpretation would be consistent with EC Treaty Article 10 (mirrored in Article I-5(2) of the Constitution), which requires Member States to "abstain from any measure which could jeopardise the attainment of the

[960] Constitution art. I-12(2). However, note the special exceptions with respect to research, technological development and space, discussed in section 4.2(2) of this chapter.

objectives of this Treaty."[961] The Constitution's express restriction on national action in matters of shared competence would at least clarify, and possibly weaken, the position of the Member States. In offering the new classification of shared competence the authors of the Constitution replaced an undefined concept with a formal one. They did not so much propose a *shift* in the EU's dividing lines as the *articulation* of lines that have not been expressly described under the Treaties.

Beyond these general comments, there are several specific developments that would affect EU competences, and they are described below.

b. Specific developments of interest

(1) *Transport.* Transport is obviously critical to the operation of the internal market, and broad EU authority is to be expected. Articles III-236 to III-245 of the Constitution offer sweeping EU competence in the field, and the only references to Member State rights are: (i) Article III-236(3) requires that EU law must take local economic circumstances into consideration, (ii) Member States themselves are urged to reduce the costs assessed "in respect of crossing of frontiers,"[962] and (iii) special consideration is given to Germany in relation to the economic challenges associated with the country's reunification."[963]

The Constitution's provisions are essentially taken from Articles 70 to 80 of the EC Treaty. The treaty includes the same focus on the EU with limited references to Member State authority. However, two noteworthy changes are proposed in the Constitution.[964] The first is that Article III-236(2) calls for European laws or European framework laws to establish common transport rules, conditions for non-resident carriers to operate, safety measures

[961] The European Court of Justice, interpreting EC Treaty Article 10, has stated that "to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope." Case 22/70, Commission v. Council (ERTA), 1971 ECR 263 ¶ 22.

[962] Constitution art. III-242.

[963] Constitution art. III-243.

[964] A third change merely establishes a possible cut-off point for the special consideration given to Germany as a result of its reunification. Article III-243 of the Constitution adds a provision stating that five years after the Constitution takes effect the Commission may propose and the Council may adopt a decision repealing Germany's special treatment.

and "any other appropriate measure." No special procedure is mandated for such laws, meaning that they would be subject to a qualified majority vote on the Council.[965] In contrast, where these special factors are concerned, EC Treaty Article 71(2) requires legislation to receive a unanimous vote on the Council. The change from unanimous voting to qualified majority represents a modest loss of Member State power, a shift in the dividing lines, albeit one that does not threaten essential national competences. The second change is that here again the Constitution for the first time would classify transport as an area of shared competence, a potentially significant development.

(2) *Space.* For the first time the EU would be permitted to include matters of space on its agenda. Articles III-248 to III-255 allow the EU to carry out programmes in research, technological development and space. These fields are identified in Article I-14(2) of the Constitution as areas of shared competence. The Union would "encourage" and "support" such development,[966] but would also implement its own programmes.[967] The EU's activity is also described as "complementing the activities carried out in the Member States."[968] The Union would be required to "coordinate" its activities with the Member States and cooperate with them."[969] In some matters of research the EU might establish "supplementary programmes involving the participation of certain Member States only," although the participating states would have to consent to be involved.[970]

These provisions are carried over from Articles 163 to 173 of the EC Treaty. The Constitution renumbers and rearranges the text to some extent, but the substance would remain largely the same. The primary exception is the Constitution's addition of space as a field of activity. The provisions in the EC Treaty are gathered in a title named "Research and Technological Development," while the Constitution adds the reference to space in the title of its section. Article III-254 has no counterpart in the treaty, and it would permit the Union to draw up a European space policy and implement a European space programme, as well as establishing relations with the non-EU

[965] Constitution Article III-236(3) does note that "account shall be taken of cases where their application might seriously affect the standard of living and level of employment in certain regions, and the operation of transport facilities." No procedures or remedies are attached to this exhortation.
[966] Constitution art. III-248.
[967] Constitution art. III-249.
[968] Constitution art. III-249.
[969] Constitution art. III-250.
[970] Constitution art. III-252(2).

European Space Agency. This is obviously an expansion of EU competence, but one that hardly controversial.

Curiously, although research, technological development and space are classified by the Constitution as areas of shared competence – in which Member States may act only if the EU does not[971] – Article I-14(3) states that in these fields the Union's exercise of competence "may not result in Member States being prevented from exercising theirs."[972] Thus, as previously noted in part 4 of Chapter 12 of this treatise, this field constitutes its own class of EU competence, not purely one of shared competence, but something more than merely an area of supporting, coordinating or complementary action. Since the EC Treaty never defines shared competence, one can argue that the ongoing right of Member States to act in this field after the EU has stepped in is merely a continuation of the treaty regime. However, at the same time the special arrangement in Article I-14(3) carries a negative implication. Since its exception is not offered for any of the other policies described in Articles III-209 to III-256, the designation of those areas as matters of shared competence suggests an actual loss of Member State rights to act when the Union does.

(3) *Energy.* Energy is another field that is addressed specifically for the first time in the Constitution. Under Article III-256(1) the Union is mandated to set an overall Union energy policy tied to the functioning of the internal market and to environmental protection. The EU would aim to ensure the functioning of the energy market and the security of the energy supply, and it would be required to promote energy efficiency and renewable forms of energy. Energy is identified in Article I-14(2) as an area of shared competence, but there are two primary reservations in favor of the Member States. First, EU action might not affect each state's right to "determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply."[973] Second, any energy laws "of a fiscal nature" would be required to receive the unanimous approval of the Council.[974]

The Treaties mention energy only in passing. Article 3(1)(u) of the EC Treaty refers to "measures in the spheres of energy, civil protection and tourism" among the intended Community activities. The treaty also makes passing reference to energy in its provisions on trans-European networks[975]

[971] Constitution art. I-12(2).
[972] Constitution art. I-14(3).
[973] Constitution art. III-256(2).
[974] Constitution art. III-256(3).
[975] EC Treaty art. 154(1).

and environment,[976] and energy may be included in Article 86(1), which mentions "public undertakings and undertakings to which Member States grant special or exclusive rights." However, there is no stand-alone section like Article III-256.[977]

The Constitution's unprecedented approach may might have spurred greater EU activity in this field, and if so, the level of Member State action might have been correspondingly diminished. Furthermore, the classification of energy as a shared competence might have prevented national action where it had previously been permitted. However, the Constitution would leave in Member State control the critical choice and structure of their energy sources to the Member States, and it would require that fiscal measures relating to energy be unanimously approved on the Council. The Constitution might have shifted the energy dividing line toward Brussels, but it also offered important safeguards for national sovereignty in this field.

1.4 **Coordinating, complementary or supporting action** (III-278 – III-285)

a. Overview

There are seven separate areas identified in Article I-17, further elaborated in Part III, in which the European Union might take supporting, coordinating or complementary action. Significantly, under Article I-17 the Union "shall have competence" but is not required to take this sort of action. If the Union did choose to act, Article I-12(5) states that EU action "may not entail harmonisation of Member States' laws or regulations."

The constitutional provisions and their EC Treaty counterparts, if any, are the following:

--public health (III-278; EC Treaty Art. 152),
--industry (III-279; TEC 157),
--culture (III-280; TEC 151),
--tourism (III-281; no TEC counterpart),
--education, youth, sport, and vocational training (III-282 – III-283; TEC 149 – 150)

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[976] EC Treaty art. 175(2)(c).

[977] Although energy programmes as such are not addressed in the Treaties, energy matters have been the subject of numerous competition decisions of the Commission, and significant harmonisation of energy standards in relation to the internal market has taken place under Articles 94 and 95 of the EC Treaty.

--civil protection (III-284; no TEC counterpart), and
--administrative cooperation (III-285; no TEC counterpart).

Among these fields all but the subject of industry are of interest to our examination of the EU's dividing lines.

b. New fields and other noteworthy developments

(1) *Public health.* A "high level of human health protection" is stated as an EU goal in Constitution Article III-278(1). Union action "shall complement national policies" and ""shall complement the Member States' action" in this area. The EU is to "encourage cooperation between the Member States . . . and, if necessary, lend support to their action."[978] The Member States are expected to "coordinate among themselves their policies and programmes,"[979] while the states and the Union together must cooperate with third countries and international health organisations.[980] The EU must "respect the responsibilities of the Member States for the definition of their health policy and the organisation and delivery of health services and medical care."[981] Article III-278 does identifiy a number of specific subjects in which the EU may legislate,[982] although even in these areas there are limitations in favor of the Member States.[983]

The constitutional provision is taken directly from Article 152 of the EC Treaty, although the Constitution contains several additions. For example, a new area of EU action would be "monitoring, early warning of and combating serious cross-border threats to health,"[984] and the Union would be required to establish measures in on these matters.[985] The Union is also called upon to adopt new measures in "setting high standards of quality and safety for medicinal products and devices for medical use."[986] In addition, the Constitution mentions for the first time the adoption of EU law relating to "the protection of public health regarding tobacco and the abuse of alcohol,

[978] Constitution art. III-278(2).
[979] Constitution art. III-278(2).
[980] Constitution art. III-278(3).
[981] Constitution art. III-278(7).
[982] Constitution art. III-278(4).
[983] Constitution art. III-278(4)(a), (7).
[984] Constitution art. III-278(1)(b).
[985] Constitution art. III-278(4)(c).
[986] Constitution art. III-278(4)(d).

excluding any harmonisation of the laws and regulations of the Member States."[987]

In addition to adding to the treaty, the Constitution would create an inconsistency in this field. The general matter of public health is an Article I-17(2) subject for supporting, coordinating or complementary action by the EU, while under Article I-14(2) the Union enjoys *shared competence* in the area of "common safety concerns in public health matters." It may be possible to navigate through Article III-278 and assign some of its provisions to public health in general and others (such as pandemics) to safety concerns relating to public health, but it can also become a game of semantics. Nevertheless, the nuances may be important, since Article I-14 would allow full EU legislation (and thus EU dominance over Member State law), while Article I-17 would significantly limit Union action (thus preserving a greater measure of Member State competence).

(2) *Culture.* The Union is required under Article III-280 of the Constitution to "contribute to the flowering of the cultures of the Member States," and it must encourage expression of "the common cultural heritage," but it must respect the "national and regional diversity of the Member States."[988] The EU is to encourage cooperation among the states, and work with them to cooperate with third countries and international organisations.[989] In its other activities the EU must consider cultural aspects, but "in particular in order to respect and promote the diversity of its cultures."[990] The Union may legislate to create "incentive measures," but this action may not require harmonisation of national laws.[991] The Council may also adopt recommendations.[992]

Article III-280 is a direct carryover from Article 151 of the EC Treaty. There is no variation in the substantive coverage of the two articles, but certain of the voting rules have changed. Article 151 contains two mandates for a unanimous vote on the Council, while the Constitution drops both of these requirements. The first is found in a provision permitting the Council to create incentive measures, and the second relates to the Council's adoption of recommendations. The elimination of unanimity as a voting requirement in the matter of culture is curious, since culture is a particularly emotional matter for some Member States and their political leaders.

[987] Constitution art. III-278(5).
[988] Constitution art. III-280(1).
[989] Constitution art. III-280(2), (3).
[990] Constitution art. III-280(4).
[991] Constitution art. III-280(5)(a).
[992] Constitution art. III-280(5)(b).

However, under the Constitution culture would be subject to no more than supporting action by the EU, and harmonisation of Member State laws would be prohibited. Thus, there might be little risk to a Member State that its cultural heritage would be infringed upon when the EU acts under the limitations of Article I-17.

(3) *Tourism.* In the area of tourism promotion, Article III-281 of the Constitution would permit the EU to encourage "a favourable environment" for tourism and promote cooperation among the Member States.[993] EU laws in this field might not require harmonisation of Member State laws.[994] Article 3 of the EC Treaty mentions the possibility of Community action in the area of tourism,[995] but neither the EC Treaty nor the TEU contains any substantive provision on the subject. Thus, Article III-281 is novel. Nevertheless, there would not likely be a surge in Union activity in this field. Due to EU budget constraints and more pressing needs for centralised action, tourism promotion would likely have been left to the Member States, with the Union playing no more than a minor supportive role.

(4) *Sport and education.* The Constitution for the first time includes sport as a subject of EU activity, through Articles III-282 and III-283, which address the diverse fields of education, youth, sport and vocational training. Under Article III-282(1) the EU would be required to "contribute" to education by "encouraging cooperation between Member States" and "supporting and complementing their action." However, the Union would be required to "fully respect the responsibility of the Member States for the content of their teaching and the organisation of education systems and their cultural and linguistic diversity." The article also would require the EU to "contribute to the promotion of European sporting issues," and in both education and sport the EU would be required to focus on the pan-European aspect, on exchanges between nations and on cross-border cooperation within the Union.[996] The EU would also be mandated to work with the Member States to cooperate with third countries and international organisations.[997] Any EU legislation relating to education or sport would be prohibited from requiring harmonisation of national laws.[998]

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[993] Constitution art. III-281(1).
[994] Constitution art. III-281(2).
[995] EC Treaty art. 3(1)(u).
[996] Constitution art. III-282(1).
[997] Constitution art. III-282(2).
[998] Constitution art. III-282(3).

An EU vocational training policy is mandated under Article III-283, but this activity must "support and complement" Member State action while "fully respecting the responsibility of the Member States for the content and organisation of vocational training."[999] The Union would be required to work with the Member States to cooperate with third countries and international organisations,[1000] and any EU laws in the field might not require harmonisation of national laws.[1001] Both Articles III-282 and III-283 contain reminders that EU law in these fields might not entail any harmonisation of Member State laws, and EU activity in these fields would be merely supportive and complementary, leaving the Member States in charge.

The education provisions in Article III-282 are taken from Article 149 of the EC Treaty, with Article III-283 on vocational training being nearly identical to Article 150 of the EC Treaty. As noted, the chief development in the Constitution is that sport is added as a new area of EU activity. This proved to be controversial, resulting in a softening of the original language of provision, with the apparent intention of limiting EU competence in actual regulation of the field.[1002] In any event, EU laws might not entail any harmonisation of Member State laws, and EU activity would be supportive and complementary, leaving the Member States in charge.

(5) *Civil protection.* Under the subject of civil protection, Article III-284 requires the EU to "encourage cooperation between Member States in order to improve the effectiveness of systems for preventing and protecting against natural or man-made disasters."[1003] EU action would entail supporting and complementing state action, promoting cooperation and promoting

[999] Constitution art. III-283(1).
[1000] Constitution art. III-283(2).
[1001] Constitution art. III-283(3).
[1002] "This is the first time the EU has claimed power over sport in its basic legal documents. UEFA [the body that regulates soccer in Europe] was alarmed that it might herald a fresh barrage of legislation. So it launched an energetic lobbying campaign that has now managed to get the phrase 'taking account of its special nature, its structures based on voluntary activity and its social and educational function' inserted into a new draft [of the Constitution]. The hope is that this phrase will provide a legal basis to argue that sport can, in certain circumstances, be exempted from the usual strictures of the EU's single-market rules." How special interests infiltrate the European Union Constitution, Economist, May 22, 2004. The referenced insert into Article III-282(1) has been included in the final version of the Constitution, with the exception that the introductory words are "taking account of the specific nature of sport."
[1003] Constitution art. III-284(1).

consistency,[1004] and Union laws in this area might not require harmonisation of national laws.[1005] There is no corresponding provision in the Treaties. However, as defined in the Constitution, the area of civil protection would not relate to actual responses to disasters. Rather, Article III-284 deals only with planning and prevention. Even with the Constitution's new provision, the EU's involvement in the field would clearly be secondary to that of the Member States.

(6) *Administrative cooperation.* Article III-285 aims at the effective implementation of EU law by the Member States.[1006] The EU might "support the efforts of the Member States to improve their administrative capacity to implement Union law," and offer information and training to the states.[1007] If the EU were to offer assistance, any State might decline to accept such support, and EU action could not require harmonisation of national laws.[1008] However, the foregoing flexibility was specifically to be "without prejudice to the obligations of the Member States to implement Union law or to the prerogatives and duties of the Commission."[1009] Article III-285 is innovative, not based on any treaty provision. Administrative training and coordination are areas in which the EU can indeed provide useful support and complementary action, but significant responsibility would remain with the Member States to implement and administer EU law.

2. THE OVERSEAS COUNTRIES AND TERRITORIES (III-286 – III-291)

Title IV of Part III of the Constitution, "Association of the Overseas Countries and Territories," deals with matters that seem to fall somewhere between "internal policies and action" and "external action." It relates to EU relations with non-European countries and territories having special relations with Denmark, France, the Netherlands and the United Kingdom. Its provisions are carried over from Articles 182 to 188 of the EC Treaty, with no substantive changes.

[1004] Constitution art. III-284(1).
[1005] Constitution art. III-284(2).
[1006] Constitution art. III-285(1).
[1007] Constitution art. III-285(2).
[1008] Constitution art. III-285(2).
[1009] Constitution art. III-285(3).

3. THE UNION'S EXTERNAL ACTION

The field of external action has always been a subject of controversy for the European Union and its Member States. The desire for Europe to take concerted action in foreign affairs is offset by an insistence that Member States maintain their sovereignty in the international arena. In its mandate for the Convention, the Laeken Declaration asked for consideration of Europe's role in a "fast-changing, globalised world," and it stated: "Europe needs to shoulder its responsibilities in the governance of globalisation."[1010] It noted that EU citizens "want to see Europe more involved in foreign affairs, security and defence, in other words, greater and better coordinated action to deal with trouble spots in and around Europe and in the rest of the world."[1011] Ultimately, it asked "How . . . should a more coherent common foreign policy and defence policy be developed?"[1012] It offered no guidance, however, as to how these questions should be answered. Thus, the Convention possessed wide latitude to consider dramatic new programs and procedures in the EU's external action, but its response to this opportunity was, at best, conservative. The Constitution's substantive treatment of external action is not significantly at variance with the approach of the Treaties, and as a result, only a few points of interest will be described here.

3.1 **Common foreign and security policy**

Article I-3(4) of the Constitution provides a broad mandate for the European Union to have "relations with the wider world." This is accompanied by several statements of objectives that are somewhat broader than those found in TEU Articles 3 and 11. However, in matters of substance the Constitution's approach to the CFSP is more a matter of emphasis than substance.

(1) *Unanimous decision-making and exceptions.* Article III-300(1) of the Constitution provides that decisions on CFSP matters are to be taken unanimously by the Council, but Article III-300(2) offers four exceptions – four instances in which the Council may act by QMV. The first and third of these involve implementing prior (unanimous) decisions by the European Council, and the fourth relates to appointment of a special representative. The

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[1010] Laeken Declaration, supra note 143, at 20. Note that the Declaration of Nice, which preceded the Laeken Declaration, called for a "deeper and wider debate about the future of the European Union" but did not specifically mention external relations. Nice Declaration, supra note 132, at 85.
[1011] Laeken Declaration, supra note 143, at 21.
[1012] Id. at 22.

second exception permits a qualified majority vote on a decision proposed by the Union Minister for Foreign Affairs, but that proposal itself must be requested by the European Council (which must act by consensus).[1013] The basic unanimity requirement is carried over from Article 23(1) of the TEU, and the first, third and fourth provisions for QMV under the Constitution have antecedents in Article 23(2). However, the second exception, relating to proposals from the Union Minister for Foreign Affairs, is not found in the treaty. The fact that such proposals would first be requested by the European Council (acting by consensus) is an indication that no meaningful shift to QMV is offered by the Constitution.

(2) *Increasing QMV.* A potential increase in QMV decision-making is offered in Article III-300(3), which would permit the European Council to extend QMV to areas beyond those identified in Article III-300(2). This is a *passerelle*, because it would permit a change in the constitutional voting requirements without resorting to an amendment to the document. The procedure is not provided in the TEU. The obvious limitation on any significant movement under Article III-300(3) is that the European Council would be required to act unanimously in any decision to alter the rules.

(3) *Extended ECJ jurisdiction.* As analysed in Chapter 13, Article III-376 offers a limited, but significant extension of the jurisdiction of the European Court of Justice into the CFSP.

(4) *Limits on EU competences.* Article I-40(1) of the Constitution makes it clear that the mandate to the Union to engage in foreign and security policy is based not on the relinquishment of Member State competence, but on "the development of mutual political solidarity among Member States . . . and the achievement of an ever-increasing degree of convergence of Member States' actions." This is taken in part from TEU Article 11(2), which requires

[1013] Marise Cremona describes the second exception as follows: "This is likely to apply where the European Council, by specifically requesting a Ministerial proposal, has given a clear indication of the policy line to be adopted on a specific issue." Marise Cremona, The Draft Constitutional Treaty: External Relations and External Action, 40 C.M.L.R. 1347, 1358 (2003). With regard to all of the QMV matters, she comments: "In all these cases the existing safeguard clause is preserved, allowing a Member State to oppose a vote for vital and stated reasons of national policy. As is now the case [under the TEU], following this use of the 'veto' the Council may refer the matter to the European Council for a decision by unanimity; however the draft [Constitution] interposes, before such a deferral, a stage during which the Minister for Foreign Affairs attempts to broker a solution acceptable to all; in other words a unanimous decision taken at Council of Ministers level obviating the need for referral to the European Council." Id. at 1358-59.

the Member States to "work together to enhance and develop their mutual political solidarity." Furthermore, according to Article III-308 the implementation of the CFSP might not affect the application of other EU competences, and the exercise of those other competences might not affect the carrying out of the CFSP. These statements, which have no antecedents in the Treaties, are reminders that under the Constitution the EU's competences are carefully drawn. The common foreign and security policy would have defined limits, and activities in the field might not be used to affect the powers and rights reserved to the Member States.

3.2 **Common security and defence policy (CSDP)**

(1) *Scope of the CSDP.* The common security and defence policy is introduced in Part I of the Constitution, in Articles I-12, I-16 and I-41. Articles III-309 to III-312 offer additional detail as part of the chapter on the common foreign and security policy.[1014] Article I-12(4) states that the "progressive framing of a common defence policy" is one of the goals of the EU's common foreign and security policy, and under Article I-16(1) the Union is granted competence in this field. The EU would be required by Article I-41(1) to seek an "operational capacity drawing on assets civil and military" and to use its assets outside the Union for peace-keeping missions and conflict prevention. Article III-309(1) also mentions a Union responsibility to fight terrorism. Under Articles I-41(3) and III-311 a European Defence Agency would be established by the EU to develop information and generally promote the CSDP. Under Article III-311(2) the Agency's "statute, seat and operational rules" would be decided by a QMV decision of the Council.

A common defence policy is referred to in the Preamble to the TEU and in Article 2 of the treaty. In Article 13 defence is mentioned as part of the CFSP. The primary article on the CSDP is TEU Article 17, which was the basis for Articles III-309 to III-312 of the Constitution. However, the TEU contains no overview provision like Article I-41. The treaty does mention peace and peacekeeping in Articles 11 and 17, but no reference is made to using EU assets outside the Union for peacekeeping activities. The TEU's only references to terrorism are in the Third Pillar.[1015] The Constitution's requirement of unanimity in Council decisions on defence is a carryover from

[1014] For general commentary on the CSDP, see Cremona, supra note 1013, at 1359-61. For an analysis of decision-making on CFSP matters under the Treaties, see Gisela Müller-Bandeck-Bocquet, The New CFSP and ESDP Decision-Making System of the European Union, 7 Eur. Foreign Affairs Rev. 257 (2002).
[1015] See TEU arts. 29, 31.

Article 23(1) of the TEU, which applies to the entire field of CFSP. Like Article III-300, TEU Article 23(2) provides that QMV decision-making is not applicable in the case of decisions "having military or defence implications."

The Constitution offers a much more complete picture of the EU's possible activities related to defence. Article I-41 provides an overview that is lacking in the TEU. The Constitution also speaks of the Union developing an operational capacity and using its assets outside the EU for peacekeeping and conflict prevention, whereas the treaty mentions peacekeeping,[1016] but is silent as to an EU operational capacity. The Constitution's reference to establishing a European Defence Agency is unprecedented.

(2) *Emphasis on Member States and defence.* Despite the stated intention of developing a common policy, the Constitution repeatedly emphasises the defence needs of the individual Member States, it anticipates action by the states, and it leaves ultimate power in their hands. Article I-41 would require that Union decisions on security and defence be taken unanimously by the Council,[1017] and the actual creation of a common defence would be subject to a consensus vote of the European Council.[1018] The provisions of Article III-300 permitting some QMV decision-making in the CFSP would expressly not be applicable to "decisions having military or defence implications."[1019] Furthermore, there is emphasis in Article I-41(3) on the fact that military resources would remain in the hands of the Member States, who are urged to progressively improve their individual military capabilities. Articles I-41(6) and III-312 provide mechanisms for "permanent structured cooperation" among groups of Member States who might act on the Union's behalf.[1020] Last, under Article III-311(2), a Member State's participation in the European Defence Agency would be optional.

[1016] TEU art. 17(2).
[1017] Constitution art. I-41(4).
[1018] Constitution art. I-41(2).
[1019] Constitution art. III-300(4).
[1020] Marise Cremona has commented on the Constitution's provision for action by groups of Member States: "The extended CSDP provisions in the draft Treaty, as well as providing a more extensive basis for the development of an increasingly important aspect of Union external policy, are also characterized by their emphasis on flexibility. Smaller—or larger—groups of Member States will take on more extensive commitments, on both a long-term and on a case-by-case basis. This is the way that the CSDP has developed and it makes pragmatic sense in terms of the very different traditions and capabilities of the Member States. The role of the European Council and Council of Ministers will however be crucial, in ensuring consistency and avoiding a multiplicity of Member State initiatives with insufficient coordination and linkage to other Union policies." Cremona, supra note 1013, at 1361.

In matters emphasising Member State assets and actions the constitutional provisions are generally without precedent. The TEU contains no provision like Articles I-41 and I-43 that call on Member States to provide assistance to each other. Likewise, the references in Article I-41 to the defence policies and the NATO obligations of certain Member States are innovative. Furthermore, there is no treaty antecedent for references in Articles I-41 and III-310 to the use of Member States or their assets for EU purposes, and there is no treaty language comparable to the reference in Article III-312 to permanent structured cooperation among groups of Member States. The Constitution's provision for structured cooperation resembles "enhanced cooperation" under the Treaties, but without the requirement for participation by a certain number of states.

(3) *Style versus substance.* The far more elaborate approach of the Constitution with regard to EU defence matters is not matched with commensurate new Union assets and powers to institute and implement a defence policy. It is also not accompanied by any real EU power. In terms of dividing lines, the status quo would be maintained, with all defence decisions still requiring Member State consensus. Thus, the actual expansion of EU activity in the area of CSDP would most likely have continued to be a process of gradual development.

3.3 **Other aspects of external action**

The other chapters of Title V of Part III of the Constitution include:

--Common commercial policy (Articles III-314 to III-315)
--Cooperation and humanitarian aid (III-316 to III-318)
--Restrictive measures (III-322)
--International agreements (III-323 to III-326)
--EU representation (III-327 to III-328)
--Mutual assistance (I-43, III-329)

None of these areas proposes any movement of any dividing lines.

4. SUBSTANTIVE MATTERS AND THE DIVIDING LINES

In matters of the EU's substantive activity it is important to note that a detailed comparison of the Constitution's 156 articles governing internal activities and its 38 articles on external action would reveal a significant rearrangement of the counterpart provisions in the Treaties. However, the

substance of the Treaties would largely be preserved, and it is beyond the scope of this treatise to recite each constitutional provision and its treaty antecedent. In Chapter 16 and in this chapter we have reviewed all of the internal and external provisions of the Constitution that arguably might have an impact on the Union's dividing lines. Let us briefly recap what we have found.

With respect to internal matters, certain decisions relating to multi-state social security calculations, professional licensing, transport and culture would move to QMV under the Constitution. Member States wishing to impose restrictions on capital and payment flow would be required to first obtain unanimous approval by the Council, in contrast to a state's presumptive authority under the EC Treaty. The Constitution also offers for the first time the prospect of EU activity in creating intellectual property protection, space programs, energy policy, sport, civil protection and administrative cooperation. New Union initiatives in public health and tourism promotion are also provided for.

In external affairs the Constitution offers some prospect for additional QMV decision-making in the common foreign and security policy as well as for extended jurisdiction by the Court of Justice, but these are very carefully contained. An expanded common defence activity is also contemplated, but without clearly defined mandates.

With the notable exception of the AFSJ, discussed in Chapter 16, a wholesale reworking of the substantive competences of the European Union was clearly not on the Convention's agenda. Looking at the items identified in this chapter, none of them individually amounts to a significant dividing-line shift. Even taken collectively, they should not raise any concern. These items represent either relatively minor adjustments, or relatively cautious innovations.

Part Five: Commentary and Conclusion

Chapter 18

A Critique of the Constitutonal Treaty's Structure

In our search for the European Union's dividing lines we have explored the text of the Constitution from front to back, and we have examined its provisions from many angles. One byproduct of this inquiry is that we have developed an intimate acquaintance with the structure of the document and its style. It is going too far to state that this familiarity breeds contempt, because there is much to admire in the Constitution. However, working with the document also gives rise to disappointment over its craftsmanship. It is appropriate, then, to offer a few observations on the merits of the Constitution as a workable legal text.

In Chapter 2 we noted that one of the primary motivations behind the Constitution was a desire to reorganise and simplify the existing EU Treaties. Was this accomplished? Yes and no. We can recognise a number of positive results, and these will be identified in the first section of this chapter. But the same analysis will also describe the Constitution's most obvious negative features – its length and style. Following that we come to the heart of the matter, which focuses on the awkward results created by drafters when they chose to scatter related provisions throughout various parts of the document. In the third section two possible solutions to this drafting problem are proposed. One would maintain most of the present text but with many of the overlapping parts merged together. The second would eliminate much of the Constitution's detail in favor of a more basic statement of critical principles. The conclusion is that the Constitution as written is not as effective as it could have been, and that its quality as a document does not match its potential political significance.

1. TOO MUCH OF A GOOD THING?

Among the Constitution's innovations that reflect both substantive improvement and simplification are the following:

--The Three Pillars of the TEU would be scrapped, although their subjects of activity would remain intact.

--The EC Treaty and the TEU would be merged into a single text.

--The European Union would replace the European Community, and all references to the Community would be excised.

--In connection with elimination of the Pillars, there would be a reduction in the types of EU legal instruments, and decision-making procedures would be made more uniform.

--The Constitution would provide a much clearer delineation of the relative competences of the Union and the Member States, even though the actual balance of power would generally be unchanged.

It might also be argued that Part I, which offers an unprecedented snapshot of the EU and its institutions, makes the Constitution more approachable to the average European citizen.[1021] This is a contestable point, however, and will be the subject of further discussion below.

The Constitution also offers a number of important institutional and procedural changes to the European Union, including a more permanent European Council Presidency, a new Union Minister for Foreign Affairs, a smaller Commission, a revised formula for qualified majority voting in the Council, and more co-decision for the European Parliament.

Unfortunately, the Constitution's length and style leave much to be desired. Brevity is entirely lacking – the text alone consumes 202 pages in the Official Journal. With protocols, declarations and other addenda the constitutional corpus comprises a book of 482 pages. The principal reason is that in addition to the newly crafted provisions in Part I and the new subject matter in Part II, Part III of the Constitution largely retains the substance and particulars of the existing Treaties.

[1021] Peter Ludlow offers "twenty six reasons for welcoming Part 1 of the Constitution." Ludlow, supra note 681, at 27. For a general comment on the positive and negative aspects of the document, see Emmanouilidis, supra note 766, at 5-8.

One commentator has asserted that the text's provisions are "hardly less complex than the treaties they are meant to supplant."[1022] The Centre for Applied Policy Research has criticised "the opaque structure of the text as a whole and the resulting fact that the citizens will find it difficult to read and comprehend the Constitution."[1023] Another observer has characterised the document as "depressingly long and wordy," containing too much "EU jargon" and "far too much detail to be easily intelligible to ordinary citizens."[1024] A commentary has asked: "Did anyone test-drive the turgid, legalistic text with a sample of citizens from different backgrounds and different countries? This would soon have shown that this text is heavy and rather impenetrable."[1025] One writer has decried the document's "lack of Jeffersonian democratic artistry,"[1026] while another has caustically remarked that it possesses "the literary charm of an unhelpful set of instructions accompanying flatpack furniture."[1027]

Succinctness and artistry aside, a significant challenge in working with the Constitution's text is the fact that related provisions are scattered throughout the document, rather than presented together. This compels the reader to jump back and forth through the text, searching for articles relevant to a particular subject. The following section will highlight the most pronounced examples of this phenomenon.

2. A CONFUSING TEXTUAL DIASPORA

The general categories of material that comprise the Constitution may be broadly described as preambles and statements of objectives, operating principles, institutional provisions, articles on the forms of EU legislation, and

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[1022] Siedentop, supra note 153, at 21.

[1023] Janis A. Emmanouilidis & Claus Giering, Light and Shade—An Evaluation of the Convention's Proposals, in Centre for Applied Policy Research, EU Reform, Convention Spotlight 1 (Aug. 2003) [hereinafter Emmanouilidis & Giering]. The opaqueness of the Constitution's text has been attributed to the "continuing elitist nature of EU construction." Hughes, supra note 153, at 6.

[1024] Quentin Peel, Europe's constitution misses its moment, Fin. Times, June 17, 2003, at 23.

[1025] Head-to-head: Is EU blueprint democratic?, BBC News, June 20, 2003, at http://news.bbc.co.uk/2/hi/europe/3006156.stm.

[1026] John Vinocur, An EU Constitution? No Big Deal, Int'l Herald Trib., June 25, 2003, at 1.

[1027] A draft EU constitution that is far from satisfactory, Times London, May 27, 2003, at 17.

substantive provisions on human rights, the internal market and other matters. Textual fragmentation is found in each of these categories.

2.1 Preambles and statements of objectives

An initial observation is that the Constitution contains two preambles, one relating to the entire document and another introducing Part II. Both contain appropriately lofty statements that provide context and express intent, but it is not clear why two preambles are necessary. Both speak of common values and shared heritage, with due respect for the differences in national cultures. Both emphasise the central role of the individual in society, the necessity for protecting human rights, and respect for law. Important as these principles are, it seems unnecessary to state them twice. In addition, the function of the Part II preamble is not obvious. It apparently relates to Part II only, but its ideals might well be useful to interpret the entire Constitution. On the other hand, the preamble for the entire document is evidently intended to serve the entire text, including Part II, but it could also be argued that the more specific Part II preamble should supersede its more general Part I counterpart with regard to interpretation of Part II.

Parts I and III do not have preambles as such, but they contain statements of objectives that serve a similar function. Title I of Part I is captioned "Definition and Objectives of the Union," and it contains two provisions, Articles I-2 and I-3, that broadly express values comparable to those included in the preambles—equality, human rights, non-discrimination, and the rule of law.[1028] Likewise, Title I of Part III broadly requires the Union to act with consistency,[1029] promote equality of the sexes[1030] and certain social rights,[1031] combat all forms of discrimination,[1032] protect the environment and promote sustainable development,[1033] protect the rights of consumers,[1034] respect the welfare of animals,[1035] and behave with fiscal responsibility.[1036] While most of these articles expressly relate to Union activity under Part III

[1028] In addition, with respect to the internal market only, Article I-4 prohibits discrimination on the grounds of nationality.
[1029] Constitution art. III-115.
[1030] Constitution art. III-116.
[1031] Constitution art. III-117.
[1032] Constitution art. III-118.
[1033] Constitution art. III-119.
[1034] Constitution art. III-120.
[1035] Constitution art. III-121.
[1036] Constitution art. III-122.

("The Policies and Functioning of the Union"),[1037] curiously two of the provisions are not so limited.[1038] An additional statement of objectives is Article III-292, which identifies many of the same values as principles to guide the EU's external action.

None of the referenced provisions in Parts I and III contain sufficient detail to be qualitatively distinguishable from the preambles, and thus their purpose might be questioned. Their placement as textual articles is not explained, nor is it clear whether their inclusion in the text gives them more authority than similar statements in the preambles. Quite obviously, they could be included in the preambles, but they are not; and indeed, longer preambles would not be desirable. However, as the above description demonstrates, the drafters of the Constitution chose a decidedly random approach in expressing the ideals for the Union.

2.2 **Competences and operational concepts**

The Constitution contains critical information about the powers assigned to the EU and how the Union and Member States may function within the EU system. Finding this information, however, requires searching through various parts of the document.

The Union's competences are conferred by the Member States. This is a key concept that is described at several points in the Constitution. Its first expression is found in Article I-1(1), which states that the Constitution establishes the Union, "on which the Member States confer competences." The same provision requires the EU to pursue Member State objectives by exercising the competences conferred by the States. Article I-11 then reiterates twice that conferral is granted by the Member States.[1039] Implying conferral by the States without specifically mentioning them, Article II-111(1) links activities under the Charter with the limits of Union power "as conferred on it in the other parts of the Constitution." Similarly, Article III-115 emphasises that the Union must act under Part III "in accordance with the principle of conferring of powers." These repeated reminders of the conferral principle may be seen as nothing more than appropriate emphasis of the doctrine. However, the multiple references lack a clear pattern, and they are somewhat inconsistent by describing Union competences as being conferred

[1037] It is worthwhile to note that the basic prohibition against nationality-based discrimination found in Constitution Article I-4, like its counterpart in EC Treaty Article 12, is a critical factor to the operation of the internal market.
[1038] Constitution arts. III-120, III-122.
[1039] Constitution arts. I-11(1), I-11(2).

by the Member States in some instances and by the Constitution itself in others.[1040]

Union action is restricted by the principles of subsidiarity and proportionality, and Article I-11 provides useful definitions of the two terms.[1041] Much more detail on the application of these principles is found in a protocol attached to the Constitution,[1042] and Article I-11 helpfully refers to the supplemental document. However, the provision fails to mention another relevant protocol[1043] that contains procedural details regarding the role of Member State parliaments in reviewing proposed legislation against the subsidiarity and proportionality requirements.[1044]

Enhanced cooperation is nicely described in Article I-44.[1045] However, critical details are found in Part III,[1046] and in this instance the drafters of Article I-44 have helpfully included cross references to the related provisions.[1047] But the Constitution does contain additional cooperative procedures that are not mentioned in Article I-44 or its Part III counterparts. For example, in the area of common security and defense policy, there are mechanisms created for "permanent structured cooperation" among groups of Member States who might act on the Union's behalf,[1048] or "commitments and cooperation" among States for mutual defense.[1049] Neither of these mechanisms has yet been implemented. One further cooperative measure is found in Part IV, in which the Benelux "regional union" (which predates the Treaty of Rome and continues to exist) is specifically approved.[1050] Like enhanced cooperation, the mechanisms for permanent structured cooperation are introduced in Part I of the Constitution and elaborated in Part III.[1051] Regarding commitments and cooperation on defense, Article I-41(7) refers not to Part III but to the Member States' obligations under NATO and under the United Nations Charter.

[1040] Constitution arts. I-12(1), I-12(2), I-14(1). See also Constitution arts. I-3(5), I-6.
[1041] See discussion in part 2 of Chapter 12 of this treatise.
[1042] See Protocol on Subsidiarity, supra note 273.
[1043] See Protocol on National Parliaments, supra note 273.
[1044] Id. at arts. 1–4.
[1045] For a discussion on enhanced cooperation and other cooperative procedures, see part 4 of Chapter 10 of this treatise. For a description of the Convention's negotiations over enhanced cooperation, see Norman supra note 152, at 99, 117, 186, 242-43.
[1046] Constitution arts. III-416 to III-423.
[1047] Constitution arts. I-44(1), I-44(2).
[1048] Constitution art. I-41(6).
[1049] Constitution art. I-41(7).
[1050] Constitution art. IV-441.
[1051] Constitution art. III-312.

Another operational concept that is covered in both Part I and Part III of the Constitution is the financial and budgetary scheme for the Union.[1052] The provisions in Part I comprise a separate title, "The Union's Finances,"[1053] and they offer general principles for EU revenue and expenditure,[1054] along with descriptions of the Union's financial resources,[1055] the multiannual financial framework[1056] and the annual budget.[1057] The real nuts and bolts, however, are to be found in Part III,[1058] whose provisions are only partially cross-referenced in Part I.

The foregoing examples illustrate the Convention's apparent intention to use Part I of the Constitution to lay out the basic principles of how the Union is to act and under what authority it may do so. Unfortunately, the drafters failed to include all of the relevant material in Part I or failed to provide adequate cross references to related provisions in Part III.

2.3 **The institutions and their activities**

Among the innovative sections of Part I, its Title IV provides a description of the Union's institutions.[1059] Article I-19 identifies the primary institutions and states their objectives, while ensuing articles offer basic information on each body. Additional provisions deal with key matters such as the presidencies of the European Council and Commission, the new Union Minister for Foreign Affairs, formations of the Council and the revised system of qualified majority voting on the European Council and Council.

As a summary, Title IV of Part I is useful, and it does offer in straightforward fashion the Constitution's institutional innovations. However, as governing text the provisions of Part I are obviously incomplete. All of the following institutions or bodies are introduced in Part I, but with important details reserved for Part III: the European Parliament,[1060] the European Council,[1061] the Council,[1062] the Commission,[1063] the Court of Justice,[1064] the

[1052] For a broader discussion of the budget, see part 3 of Chapter 8 of this treatise.
[1053] Constitution arts. I-53 to I-56.
[1054] Constitution art. I-53.
[1055] Constitution art. I-54.
[1056] Constitution art. I-55.
[1057] Constitution art. I-56.
[1058] Constitution arts. III-402 to III-415.
[1059] Constitution arts. I-19 to I-32. For an extended analysis of the institutions see Chapter 13 of this treatise.
[1060] Constitution arts. I-20, III-330 to III-340.
[1061] Constitution arts. I-21 to I-22, I-25, III-341.

European Central Bank,[1065] the Court of Auditors,[1066] the Committee of the Regions,[1067] and the Economic and Social Committee.[1068] In addition, Part III contains provisions, not reflected in Part I, relating to the European Ombudsman[1069] and the European Investment Bank.[1070] Part III also contains a number of procedural articles affecting all of the EU's institutions and other bodies.[1071] Furthermore, several protocols to the Constitution describe the functioning of the institutions.[1072]

Voting rules for the institutions are found in Parts I, III, and IV of the Constitution. For the European Parliament, its standard rule of majority voting is found in Article III-338, although other rules may apply.[1073] For the European Council, the requirement of consensus voting as the norm is found in Article I-21(4), but other provisions permit decisions to be taken by less than a unanimous vote.[1074] Article I-23(3) provides that the standard procedure for the Council is to vote by qualified majority vote,[1075] but other

[1062] Constitution arts. I-23 to I-25, III-342 to III-346.
[1063] Constitution arts. I-26 to I-28, III-347 to III-352.
[1064] Constitution arts. I-29, III-353 to III-381. In addition to the Constitutional text, there is an extensive Statute of the Court of Justice. See Protocol on Statute of Court of Justice, supra note 817.
[1065] Constitution arts. I-30, III-382 to III-383.
[1066] Constitution arts. I-31, III-384 to III-385.
[1067] Constitution arts. I-32, III-386 to III-388.
[1068] Constitution arts. I-32, III-389 to III-392.
[1069] Constitution art. III-335.
[1070] Constitution arts. III-393 to III-394.
[1071] Constitution arts. III-395 to III-401.
[1072] See, for example, Protocol on Statute of Court of Justice, supra note 817; Protocol on Privileges, supra note 367; Protocol on the Statute of the European System of Central Banks and of the European Central Bank, Dec. 16, 2004, O.J. (C 310) 225; Protocol on the Location of the Seats of the Institutions and of Certain Bodies, Offices, Agencies and Departments of the European Union, Dec. 16, 2004, O.J. (C 310) 261; Protocol on the Euro Group, Dec. 16, 2004, O.J. (C 310) 341. These and others are appended to the Constitution.
[1073] Certain special procedures may require less than a majority or a super-majority. Constitution arts. III-333 (one quarter of Parliament's members may set up a Committee of Inquiry), III-340 (two-thirds vote to censure the Commission).
[1074] Article I-25 provides two different formulas for qualified majority voting on the European Council. For a description of the decisions for which unanimity is not required, see note 723, supra.
[1075] The voting formulas are found in Article I-25.

voting rules may be found elsewhere throughout the Constitution[1076] and in a draft decision of the Council.[1077]

Because of the described arrangement of the text, anyone studying the Constitution's institutional provisions must set Part I against the other parts of the document, including its protocols, to see the whole picture. In the case of voting rules, the normal procedures are found in various places, but the exceptions to those rules are numerous, and a careful search of the full text is necessary to determine whether one of the many exceptions might apply. In broad terms, Part I describes the Constitution's innovations, but it does not offer enough institutional detail to stand alone or to permit the reader to rely on its provisions. Likewise, and if the intention of the Constitution's drafters was to summarise in Part I all of the innovations relating to the institutions, they have not succeeded. The best that can be said is that Part I offers a nicely organised overview, but nothing more.

2.4 **Legal instruments**

The Constitution's reduction in the number of permissible legal instruments, as outlined in Article I-33, appears on the surface to be a significant step toward simplifying EU law, and it serves as a concrete manifestation of the elimination of the Pillar structure. A closer look, however, reveals that there are many other legal acts available to the Union.[1078] Herwig Hofmann[1079] offers a useful analysis, demonstrating that Article I-33 is by no means exclusive.[1080] He notes that the EU will continue to use delegated regulations,[1081] inter-institutional arrangements,[1082] and "soft law tools" such as "guidelines, vademecums, codexes, notices or circulars to Member State administrations."[1083] Furthermore, Article I-37(3) calls for "rules and general principles" for Member States to control the Commission's

[1076] See discussion in Chapter 15 of this treatise.
[1077] See Declaration on Article I-25. The draft decision, which will be adopted by the Council on the day the Constitution takes effect, permits three-fourths of a blocking minority (based on population or numbers of States in such a minority) to force the Council to reconsider a measure that has received a qualified majority vote. One commentator has noted that this is "an additional complicating factor" that may interfere with efficient Council operations. Grevi, supra note 402.
[1078] See the discussion in part 1 of Chapter 14.
[1079] Hofmann, supra note 597.
[1080] Id. at 3, 7.
[1081] Id. at 9–14; see also Constitution, at art. I-36.
[1082] Hoffman, supra note 589, at 17-18.
[1083] Id. at 7.

exercise of its delegated implementing powers, and the implementing acts of the States would themselves take many forms and be part of the system of Union law.[1084]

The Constitution also provides various types of direct EU action outside the normal scope and procedures of Article I-33, including: agreements between the EU and IGOs or third countries,[1085] budgetary and financial framework decisions,[1086] certain acts of the European Parliament,[1087] various forms of "coordinating, complementary or supporting action"[1088] and actions relating to the common foreign and security policy,[1089] common security and defense policy,[1090] and the area of freedom, security, and justice.[1091] Finally, amendment of the Constitution itself is subject to special procedures.[1092]

The European Union is a complex system, internally and with regard to its relationship with the Member States. The need for variety and fluidity in the forms of EU action is understandable, and the Constitution provides ample flexibility. The concern here is that Article I-33 suggests a simple approach that does not withstand closer scrutiny.

2.5 **Fundamental rights and EU citizenship**

Part II is the Constitution's Bill of Rights, its great statement of fundamental human rights that must be guaranteed by and within the Union.[1093] But there are additional provisions on the subject. Part I has a title named "Fundamental Rights and Citizenship of the Union."[1094] In it, Article I-9 requires the EU to recognise the rights expressed in Part II, and it calls for the Union to accede to the European Convention for the Protection of Human Rights (ECHR).[1095] It also incorporates as "general principles of the Union's

[1084] Constitution art. I-37(1).
[1085] Constitution art. III-317(2).
[1086] Constitution arts. I-54(3) (requiring Member State ratification), I-55(4) (permitting the European Council to change the specified voting procedures).
[1087] Constitution arts. III-330(2), III-333.
[1088] Constitution arts. III-278 to III-285.
[1089] Constitution art. I-40.
[1090] Constitution art. I-41.
[1091] Constitution art. I-42.
[1092] Constitution arts. IV-443, IV-444, IV-445. See discussion in Chapter 11 of this treatise.
[1093] See discussion in part 3 of Chapter 7 of this treatise.
[1094] Constitution arts. I-9 to I-10.
[1095] Constitution arts. I-9(1), I-9(2).

law" the fundamental rights arising from the "constitutional traditions common to the Member States."[1096] The preamble to Part II then refers to these same sources of law and actually expands on them. It "reaffirms" the rights arising from the "constitutional traditions and international obligations common to the Member States," the ECHR, "the Social Charters adopted by the Union and by the Council of Europe," the case law of the European Court of Justice and the case law of the European Court of Human Rights.[1097] It further states that Part II will be interpreted by the Court of Justice and Member State courts "with due regard" to certain "explanations" prepared by the Charter Convention, as later updated by the European Convention.[1098]

Closely related to "fundamental rights" are EU citizenship rights and principles of democracy within the Union. Article I-10 guarantees Union citizens the right to "move and reside freely" in any Member State, the right as a resident to vote and stand as a candidate in municipal and European Parliament elections, certain rights to diplomatic and consular assistance from any Member State and the right to deal with EU institutions in any official EU language.[1099] Part II repeats the grant of rights relating to voting and standing for election,[1100] and Part III, in its own title on "Non-Discrimination and Citizenship,"[1101] contemplates additional Union legislation relating to citizens' rights.[1102] An additional set of principles in Part I is entitled "The Democratic Life of the Union."[1103] Once again, equality is demanded,[1104] and citizens are offered access to the EU institutions,[1105] transparency in institutional activities,[1106] personal data privacy[1107] and the assistance of an ombudsman to address grievances about the institutions.[1108]

[1096] Constitution art. I-9(3).
[1097] Constitution pt. II Preamble.
[1098] Constitution pt. II Preamble. A logical question is whether these explanations should be treated as part of the Constitution itself, subject to amendment only through the elaborate process required to amend the Constitution. A difficulty presented in this analysis is the fact that the explanations themselves are prefaced with the statement that "they do not as such have the status of law." Praesidium, Updated Explanations relating to the text of the Charter of Fundamental Rights, July 18, 2003, CONV 828/1/03 REV 1, at 2. For an analysis of this point, see Hofmann, supra note 597, at 20.
[1099] Constitution art. I-10(2).
[1100] Constitution arts. II-99, II-100.
[1101] Constitution arts. III-123 to III-129.
[1102] Constitution arts. III-125 to III-128.
[1103] Constitution arts. I-45 to I-52.
[1104] Constitution arts. I-45.
[1105] Constitution arts. I-45 to I-47.
[1106] Constitution arts. I-47(2), I-50.

While the Constitution's guarantee of human rights is a positive development, its approach is highly complicated. Substantive provisions on individual rights are scattered throughout Parts I, II, and III, and there is considerable repetition among them, a situation characterised by one commentator as "pointless duplications."[1109] Furthermore, the incorporation of the ECHR, constitutional traditions and international obligations common to the Member States, Social Charters of the EU, and Council of Europe, case law of two courts, and official explanations of the original Charter means that the text of the Constitution, however presented, would not be the last word on the subject.[1110] The same could be said, of course, about any national constitution, whose pronouncements on human rights are necessarily supplemented by legislation, regulation and decisional law. Interestingly, Articles II-111 to II-113 of the Constitution recognise the interplay among the various systems of rights, and they attempt to offer guidance in applying the different schemes.[1111] Unfortunately, these provisions are themselves complex, and an interpretation by the European Court of Justice would likely have been needed to sort out the various sets of principles.[1112]

2.6 **The internal market and other subjects of EU law**

Consistent with the pattern established for other provisions, the drafters of the Constitution utilised Part I to debut most of the substantive areas of EU action, while reserving the essential detail for Part III. These fields include: the internal market;[1113] monetary policy for the Eurozone Member States;[1114] economic and social policy;[1115] external action;[1116]

[1107] Constitution arts. I-51.
[1108] Constitution arts. I-49.
[1109] Dougan, supra note 358. Other commentators have criticised the overlap between human rights provisions in Part I and Part II of the Constitution, noting that this "weakens the structural clarity of the text. Furthermore, differing formulations may well lead to legal uncertainties." Emmanouilidis, supra note 766, at 3.
[1110] The Constitution's approach is not entirely unprecedented. As discussed in detail in part 3 of Chapter 7, the Treaties themselves recognise a variety of sources of human rights law. For example, Article 6(2) of the TEU requires the EU to "respect fundamental rights, as guaranteed by the [ECHR] . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community Law."
[1111] Constitution arts. II-111 to II-113.
[1112] See the discussion in part 3 of Chapter 7 of this treatise.
[1113] Constitution arts. I-13(1) (regarding competition rules relating to the internal market), I-14(2) (the internal market generally), III-130 to III-176.
[1114] Constitution arts. I-13(1), I-15(2), I-30, III-177, III-185 to III-202.

common foreign and security policy;[1117] common security and defense policy;[1118] and "the area of freedom, security and justice."[1119] The elaboration in Part III largely mirrors the text of the Treaties on these subjects, and, as noted, the introductory references in Part I are unprecedented.

3. SUGGESTIONS FOR IMPROVEMENT

In broad terms, the Convention took the EC Treaty and TEU and combined them as Part III of the new Constitution. The drafters added Part I as an overview of the Union and its competences and institutions, Part II as a bill of rights, and Part IV as a housekeeping section. Despite the real improvements mentioned earlier in this Article, is it really legitimate to describe this overall construct as a simplification?

From a drafting point of view one might argue that Part I is the most problematic section of the Constitution. Ironically, it was offered as an easy-to-digest, inspirational introduction to the European Union, a succinct rendition of the EU's components and characteristics. But in this attempt to make the Constitution more approachable and understandable, the drafters of the document actually created a deception. Just as a movie's promotional trailer may fail to reflect the true quality of the entire film, Part I's sneak preview does describe the Constitution's innovations, but it fails to reveal the document's full plot. Virtually every one of the provisions of Part I is amplified, clarified or limited by articles elsewhere in the document. Thus, the Convention presents a set of basic statements, none of which can be relied upon without an exegetical foray into Parts II, III and IV.[1120] The unhappy conclusion is that this

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[1115] In Part I, see Constitution arts. I-12(3), I-14(2), I-15(1), I-17. In Part III, see Constitution arts. III-177 to III-184 (regarding economic policy), III-203 to III-208 (employment policy), III-209 to III-115 (social policy), III-220 to III-224 (economic, social and territorial cohesion), III-225 to III-232 (agriculture and fisheries), III-233 to III-234 (environment), III-235 (consumer protection), III-236 to III-245 (transport), III-246 to III-247 (trans-European networks), III-248 to III-255 (research and technological development, and space), III-256 (energy), III-278 to III-285 (industry, human health, education, culture, tourism and civil protection). For a discussion of the complex relationship between EU and Member State competence in these fields, see Sieberson, supra note 444, at 27-28.

[1116] Constitution arts. I-3(4), I-14(4), I-57, III-286 to III-291, III-292 to III-293, III-314 to III-328.

[1117] Constitution arts. I-12(4), I-16, I-28, I-40, III-294 to III-313.

[1118] Constitution arts. I-12(4), I-41, III-309 to III-312, III-329, III-436.

[1119] Constitution arts. I-14(2), I-42, III-257 to III-277.

[1120] Janis A. Emmanouilidis and Claus Giering have noted that Part I "is not enough to provide EU citizens with a clear-cut picture of the EU as a constitutional community,"

arrangement actually increases the complexity of the Constitution under the guise of simplification.

Given the pre-Convention demands for a clearer, simpler successor to the Treaties, and in light of the textual analysis in Part IV of this Article, two straightforward means of improving the Constitution's text are offered.

3.1 **Reeling in the related provisions**

The first suggestion would be to eliminate as much of the textual fragmentation as possible. Related and overlapping provisions should be presented together, so the reader can have confidence that the presentation of a particular subject is relatively complete. Where competing considerations necessitate that significant, related material be presented elsewhere, cross references should be used if possible.[1121] This process of regrouping related articles would create a felicitous side benefit, namely, the opportunity to eliminate redundancies and clear up inconsistencies.

Looking back to the prior section, the following are examples of how the Constitution might be rearranged to bring an end to the textual scattering:

> --The preambles and statements of objectives could be combined into a single preamble for the entire document.
>
> --References to the conferral principle could be consolidated into a single article in Part I and thereafter reiterated only where necessary.
>
> --The protocol on subsidiarity could be incorporated into Article I-11, and the protocol on the role of Member State parliaments could be brought forward into the text of the Constitution.
>
> --The textual material on enhanced cooperation could be combined, preferably in Part I.
>
> --The budgetary and financial provisions could be brought together, again preferably in Part I.

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and that "the rights, obligations, aims and limits of the European Union become apparent only after one has read more than 460 articles." Emmanouilidis & Giering, supra note 1023, at 3.

[1121] Article I-44 offers a useful demonstration of cross-references.

--All of the institutional provisions in Part III and the relevant protocols could be incorporated into the related introductory articles in Part I.

--Exceptions to the standard institutional voting rules could be identified in a single article in Part I for each institution. For clarity, these references to special voting requirements might be repeated in the relevant articles in Part III, but a single initial list of these exceptions would present a more complete portrayal of how each institution operates.

--To account for the additional types of legal instruments beyond the new "basic six," Article I-33 should be expanded to describe other means of action available to the EU institutions.

--Because of the symbolic importance of describing fundamental rights in a separate part of the Constitution, Part II could be retained, but the related provisions in Parts I and III could be incorporated into the Charter. Additionally, and more controversially, the Charter could be given its full due, and references to the other sources of rights could be deleted. Critical principles from those other sources, if not currently found in the Charter, could be expressed as provisions of the Charter.

--The allocation of competences between the EU and the Member States could be retained in Part I, and this would of necessity include certain references to substantive areas of action. All other references to substantive matters, such as Articles I-40 to 42, could be moved to their related sections in Part III.

What emerges from the foregoing is a substantially expanded Part I of the Constitution, covering most of the institutional detail currently divided between Parts I and III. At the same time, the function of Part III would be clarified—it would become the substantive law section of the document. Parts II and IV would remain relatively intact. The benefit of this approach is that the different parts of the Constitution would no longer overlap, and they would have different purposes. Part I would describe in full detail the Union and its institutions. Part II would be a stand-alone Bill of Rights. Part III would cover all of the subjects of EU activity. Part IV would continue as a brief set of technical provisions.

The chief victim of this approach would be the putative stylistic elegance of Part I in its current form. This is a sacrifice well worth making. The sense of order resulting from this restructuring would bring the Constitution much closer to the people than do the streamlined but misleading introductory provisions of the current document.

3.2 **A streamlined constitution—a "basic treaty"**

The bolder approach would be to essentially retain Parts I, II and IV (amended as described in the preceding section) as the "basic treaty" contemplated in the Laeken Declaration,[1122] while moving most of Part III to a constitutional protocol or to the text of a European law, either of which could be amended, for example, by a significant supermajority but without the requirement of unanimous Member State ratification. The streamlined Constitution would have the look and feel of the rearranged document described in the preceding section, but without many of the detailed substantive provisions of Part III.[1123]

Critical features of the shortened Constitution would include the following:

--A single preamble or statement of objectives.
--Clear statements on conferral, subsidiarity, and primacy of EU law.
--Delineation of competences granted to the EU and reserved to the Member States.
--Essential detail on the institutions, the EU legislative process, legal instruments, and the Union budget.
--A comprehensive list of exceptions to the standard institutional voting rules.
--The Charter of Fundamental Rights of the Union.

As noted, the greatest practical benefit to pruning most of Part III from the Constitution is that in matters where unanimity is not politically required it would not be necessary to suffer through the constitutional amendment process to change the law.[1124] Given the vast detail in Part III, its

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[1122] See Laeken Declaration, as quoted in the text accompanying note 146, supra.
[1123] For commentary on the relationship between Parts I and III, see Jan Wouters, Drawing the Threads together from Parts I and III of the EU Constitution, in The EU Constitution: The Best Way Forward? (Deirdre Curtin, Alfred E. Kellermann & Steven Blockmans, eds., 2005).
[1124] For an analysis of the constitutional amendment procedures, see Chapter 11 of this treatise.

provisions would undoubtedly require constant fine-tuning as the Union continued to evolve,[1125] and the EU would be well-served to facilitate the necessary textual changes.[1126] A related benefit is that when the Court of Justice would be called upon to interpret Part III, the other EU institutions would more easily be able to override the Court by changing the law.[1127] As long as Part III is constitutional, a simple legislative response to a judicial ruling on Part III would be impossible. Thus, whether to enable legislation to reflect changing times or to deal with an unwelcome court decision, a simpler amendment process seems imperative to permit the political will to be exercised efficiently at the EU level.

[1125] For example, Roger Goebel has argued that the inclusion of complex and detailed provisions on economic and monetary union in the existing treaties is troublesome simply because even minor changes will be subject to the "time-consuming and cumbersome" treaty amendment process. Roger J. Goebel, European Economic and Monetary Union: Will the EMU Ever Fly?, 4 Colum. J. Eur. L. 249, 287 (1998). See TEU art. 48 for the existing treaty amendment requirements. Essentially all of the EMU provisions referenced by Goebel are retained in the Constitution.

[1126] Commentators Emmanouilidis and Giering have noted that removing the "non-constitutional" provisions from the document would "provide the EU with the ability to amend the latter on the basis of a less complex procedure." Emmanouilidis & Giering, supra note 1023, at 7. In a similar vein, columnist George Will has aptly observed that "[a] proper constitution does not give canonical status, as rights elevated beyond debate, to the policy preferences of the moment." George Will, EU should really study America's Constitution, Register Guard (Eugene, OR), Jul. 29, 2003, at A11. He adds: "The more detailed a constitution is in presenting particular political outcomes as elevated beyond the reach of changeable majorities, the more quickly it is sure to seem dated." Id.

[1127] U.S. Supreme Court Associate Justice Stephen Breyer has commented that the EU's legislative processes, which should enable the EU institutions to override rulings of the Court of Justice, significantly restrict the ability of the institutions to respond. This is because Court decisions involving treaty interpretation can be set aside only by amending the relevant treaty. The problem, according to Breyer, is that "in light of the length and the detailed nature of the ECJ's 'constitution' (namely, the basic treaties), many more ECJ decisions will likely rest upon 'constitutional' grounds." Stephen Breyer, Constitutionalism, Privatisation, and Globalisation: Changing Relationships Among European Constitutional Courts, 21 Cardozo L. Rev. 1045, 1053 (2000). The result is that "it is difficult for member states or other EC institutions to revise ECJ decisions with which they disagree." Id. at 1052. Breyer compares this situation with the United States, where constitutional decisions of the Supreme Court are "very difficult to overturn" but where decisions on statutory or administrative grounds can be set aside by "only a new statute or reconsideration by the relevant agency." Id.

By including in the more abbreviated Constitution a full recitation of voting rules and exceptions, especially detailing those instances in which the Council would be required to act unanimously, the dividing lines between the EU and its Member States would not be altered. The balance of power would also be preserved by continuing to require unanimity to amend the Constitution. Granted, any requirement of consensus either in legislation or in the constitutional amendment process may be a recipe for stagnation,[1128] but the point of this analysis is to suggest that the Constitution could be streamlined without upsetting the existing political applecart.[1129]

4. THE LAEKEN SCORECARD

To conclude this analysis, it is useful to recall the challenges posed in the Laeken Declaration[1130] and to gauge how the Convention and IGC responded:

1. *The challenge:* "Simplifying the existing Treaties without changing their content. Should a distinction between the Union and the Communities be reviewed? What of the division into three pillars?" *The result:* The two main Treaties would be melded, the substantive content would generally be preserved, and the balance of power between the Union and its Member States would largely be maintained. The Communities would be replaced by the Union in all respects. The Three Pillars would also be officially eliminated, although they would survive in spirit.

2. *The challenge:* "The possible reorganisation of the Treaties. Should a distinction be made between a basic treaty and the other treaty provisions? Should this distinction involve separating the texts? Could this lead to a

[1128] Prior to the Convention, Commission President Romano Prodi had warned that in an enlarged EU, a treaty that can be amended only by consensus might well become "fossilised." Devuyst, supra note 68.

[1129] It should be noted that there was discussion at the Convention regarding the drafting of a basic treaty. Norman, supra note 152, at 22, 63, 85. There were also proposals to relegate much of the Part III detail to a body of "organic law" falling somewhere between the Constitution and ordinary EU legislation. Id. at 66, 105. Herwig Hofmann comments that creation of organic laws would permit a shorter Constitution, but he also cautions that the new category might also "increase the overall complexity of the legal system." Hofmann, supra note 597, at 21. He also argues that removing the full detail of the Treaties from the Constitution would have weakened Member State influence over "a large range of matters." Id. at 22. Neither approach was accepted, and the Constitution actually expands rather than contracts the text of the Treaties.

[1130] See text accompanying notes 143-48, supra.

distinction between the amendment and ratification procedures for the basic treaty and for the other treaty provisions?" *The result:* Although it may look like a basic treaty, Part I of the Constitution is part of, not separate from, the document. We have suggested that the extra text in Part I actually creates more confusion than clarity. The new, somewhat simpler amendment procedures for certain provisions in Part III[1131] are an exceedingly modest step.

3. *The challenge:* "Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights." *The result:* Both of these have been proposed in the Constitution, but the overall treatment of human rights and their sources is unduly complicated.

4. *The challenge:* "The question ultimately arises as to whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in the Union. What might the basic features of such a constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union?" *The result:* A constitution was crafted, and it would have preserve the Union's values and maintained the sensitive political balance between the EU and its Member States.

Overall, it is incontestable that the Constitution offered an improvement over the existing Treaties and that would have met many of the goals set at Laeken. Nevertheless, what of the broader goals of simplification and making EU law more accessible and easily understood? It is perhaps wishful thinking to expect that the average EU citizen could ever readily grasp any constitutional document, but could it not at least have been more transparent? Could it not have been more approachable to the person willing to read it? Will the Reform Treaty be any better in this regard?

Perhaps the blame for the ponderous nature of this document should be placed on the Convention process, which relied on separate working groups but lacked an influential style committee. Or it might have been a manifestation of the old adage: "If I'd had more time I would have written you a shorter letter." Most likely, however, it was the political necessity of finding acceptability among the greatest number of decision-makers. Despite the innovative spirit that led to the drafting of Part I of the Constitution, the

[1131] See part 2 of Chapter 11.

Convention displayed an inherent conservatism, a sense of caution that produced Part III with the look and feel of the existing Treaties. The competing spirits led to inclusion of both parts, and the result is not felicitous.

5. MAYBE NEXT TIME . . .

Given the difficulty of accomplishing dramatic change in the diverse and complex EU, it is only fair in the end to credit the Convention and the IGC for agreeing on any version of a constitution, regardless of its stylistic shortcomings. Nevertheless, it is suggested that the text of the Constitution would have been amenable to significant improvement. A shorter, basic document is appealing, but even a mere rearranging of the current text would offer substantial benefits, and either approach could be accomplished without affecting the Union's dividing lines. The newly mandated Reform Treaty promises to respect the dividing lines to the same extent as the Constitution, but its resulting treaty amendments offer no prospects of being either economical or elegant.

Chapter 19

A Final Review – Holding the Middle Ground

A question never far from the minds of those who follow Union developments is: "Will the Creation come to dominate its Creators?" Federalists might be tempted to answer: "It must, and it will." Intergovernmentalists would counter: "No, never." Realists could then raise their hands and urge: "Stop! There is a middle ground, and we are standing on it. The European Union can be a significant force in Europe and the world, but the Member States need not slide into oblivion or irrelevance." The intergovernmental and federal camps are entitled to press their agendas, but this treatise has demonstrated that the Constitution would have maintained the EU as a blended entity, carefully preserving most of the dividing lines that exist under the EC Treaty and the Treaty on European Union. The Union would have continued to possess competences considerably more sweeping than those granted to a typical IGO, but it would have stopped far short of becoming a United States of Europe.

Our review of the Constitution, however, demands that we conclude with a more nuanced summation. Three points should be stressed. First, the stated motivation behind the Constitution was that Europe's foundational documents should be clearer and that the EU should be managed more efficiently. Deepening the process of integration was not an expressed goal. As a result, many of the changes proposed in the Constitution would not have entailed any shift of competence or power to the Union. Second, some movement of the EU's dividing lines was indeed proposed in the Constitution. Third, this shift was offset somewhat by renewed emphasis on the Member States and their sovereignty. Let us briefly elaborate on these propositions.

Many changes would not have shifted the dividing lines

If we review the broad list of significant changes proposed in the Constitution, which are identified in Chapter 4, we are reminded that most of them simply would not have expanded the Union's competences. Beginning with the overview offered in Part I of the Constitution, we are presented with a more coherent picture of the Union, but it is essentially a restatement rather than the creation of new concepts, new institutions or new programs. The simplification of the Union's legislative instruments was useful, but it offered no new powers. Re-definition of the ordinary legislative procedure was likewise an internal matter, not affecting the relationship between the Union and its members. The highly innovative section on the "democratic life of the Union" offered more transparency and accountability in EU affairs, but it did not undercut Member State democracy or sovereignty.

Furthermore, if we review the institutional provisions in Parts I and III of the Constitution, we observe that the document does not appear to be offering the Union's bodies any meaningful new powers. The scheduled reduction in the size of the Commission would arguably have created a measure of further separation between it and the Member States, but the Commission's mandate as the Union's professional executive would have remained the same. The EU's senior legislature, the Council of Ministers, would have made greater use of the qualified majority vote, but few matters of critical policy were proposed to be removed from the requirement of unanimous approval. The new posts of a permanent European Council President and Union Minister for Foreign Affairs might have had the potential to give the EU a cohesiveness and stature it has not yet enjoyed, but neither post appears intended to possess executive powers beyond those already assigned to existing Union officials. The identification of the European Council as an institution of the EU was little more than articulation of the status quo under the Treaties.

Even the simplified amendment procedures in Part IV of the Constitution – innovative as they are – would have stopped short of adversely affecting the deep protections offered to each Member State. Like the Treaties, the Constitution could not have been amended without the explicit consent of each state. Streamlining the process does not eliminate the national veto.

Some shifting would have occured

While many changes proposed in the Constitution would have had no impact on the EU's dividing lines, it is clear that the existing lines lines would not have been preserved absolutely intact.[1132] Upon closer inspection one can identify certain constitutional innovations that arguably would have strengthened the Union – perhaps at the expense of the Member States. For example, by calling the new treaty a Constitution, its authors strongly implied that this was to be something different from the Treaties. By granting legal personality to the Union, the Constitution would have presented an entity with enhanced stature. This entity would have utilised a single set of legislative instruments and thus a single system, rather than the Three Pillars of the Treaties. The creation of this new system and the abolishment of the Pillars arguably would have instilled a more supranational character for the Union. When the constitutional text states that EU law has primacy over that of the Member States, the commitment to this concept arguably went beyond the primacy principle as recognised by the European Court of Justice. Overall, we have proposed that these changes signal more than mere style. There was a new substance in the Constitution, indeed a new legal order. And if this new regime would not have posed an immediate threat to the sovereignty of the Member States, its new character might have proven to be at least the *beginning* of such a threat. New characterisations may portend new dimensions for the future.

The inclusion of the Charter of Fundamental Rights as Part II of the Constitution was without question an expansion on the Treaties, which lack a formal bill of rights within their text. But is this an increase in Union competence? We recall that the Union has already subscribed to the Charter as a "solemn proclamation," and that the Treaties contain a variety of similar – if less formally presented – statements about fundamental rights. Thus, inserting the Charter into the Constitution might have been no more than a reaffirmation of basic principles to which the Union is already bound or to which it has already made a serious political commitment. One could even argue that the inclusion of the Charter on its face would have taken no power from the states in favor of central authority in Brussels. However, one weakness of this position is in the fact that the integration of the Charter into the constitutional text likely would have offered greater jurisdictional power to the European Court of Justice in matters of human rights. Depending on the Court's behaviour in future cases, the national courts might well have

[1132] For a summary of the movement in the dividing lines, see Chapter 6.

experienced an erosion of their authority in this field. The Reform Treaty's derogation in favor of the United Kingdom with respect to the relationship between the Charter and national law is an indication that at least the British were of the opinion that Part II of the Constitution represented a shift in favor of Brussels.

We have also noted a potential shifting of the dividing lines in areas of substance other than human rights. These included, for example:

> --Incremental extensions of the Council's ability to make decisions by QMV in a number of substantive areas. In general, these fields included matters such as transport, social security and services, which are closely connected to the EU-dominated internal market. The most significant of the affected matters was the AFSJ, although limited new QMV decision-making in the CFSP was also provided.
>
> --Expansion of EU activity into new fields, including intellectual property rights, space, energy, tourism, sport, civil protection and administrative cooperation.
>
> --The extension of the jurisdiction of the Court of Justice into the common foreign and security policy and the AFSJ

We have argued that none of these changes by itself should have been cause for alarm. We have further proposed that these proposed changes, even when added together, did not represent a dramatic competence-shift to Brussels. Rather, they must be seen little more than the enhancement of existing Union activities and the continued evolution of commitments previously made by the Member States. In reality, the Constitution would have done far less than the Maastricht Treaty in deepening EU integration. Nevertheless, persons concerned about "creeping federalism" were appropriately on the alert, and the true Eurosceptic was appropriately wary of each and every shift in favor of the Union.

Bolstering the position of the Member States

A fascinating feature of the European Union is that its constitutional coin always has two distinct sides. Notwithstanding the significant central features built into the EU system, the power of the Union has always been carefully contained. The drafters of the Constitution actually went beyond the Treaties in emphasising both the limits on EU action and the sovereignty of the Member States.

Like the Treaties, the Constitution is permeated with language that speaks to the Member States' integrity and competence within the EU system. However, much of the Constitution's language is more forcefully expressed than in the Treaties. Also, the Constitution's clarification of EU competences cuts both ways – it confirms the propriety of certain Union action, while at the same time suggesting limits on such action and offering clearer definition of the Member States' own competences. Under the principle of conferral, which is more clearly articulated in the Constitution than in the Treaties, the Union would have been permitted to act only within the limits of authority granted to it by the Member States. Competences not conferred upon the Union would have remained with the national governments. A related principle is that the Constitution mandates the Union to respect the integrity of the Member States as sovereign nations. In matters of foreign policy and defence, such respect translates into permitting the Union to act only when there is full consensus by the Member States. These areas, which could have been employed to enhance the Union's stature as a world power, have traditionally been left to the Member States, and the Constitution offered no significant challenge to this approach.

Institutionally, the European Council is the over-arching voice of the Member States in setting EU policy, and under the Constitution it would have remained so. Its members are the heads of state or government of all the Member States, along with its own President (an innovation in the Constitution) and the President of the Commission, and when they convene it is more a summit meeting than a board of directors. The group takes its decisions by consensus – a principle understood under the Treaties but first clearly articulated in the Constitution. Under the Constitution and under the Treaties the persons sitting on the Council of Ministers also represent their respective Member States, and many of their most critical policy decisions are subject to full consensus. Unanimity and consensus are distinctly anti-majoritarian, and a single Member State can block a decision or exact concessions as the price for its vote. To avoid gridlock, opt-outs may be necessary. The ultimate expression of the unanimity principle is that the Constitution, like the Treaties, could not have been amended without the consent of each Member State. The majoritarian ideal would continue to yield to the ultimate power of the veto and the absolute right of each state to preserve what it has previously agreed to, including the Constitution's careful balancing of authority. Unanimity protects each Member State from the unwanted imposition of an ultimate loss of sovereignty.

Four procedures highlight how the Constitution would have perpetuated the intergovernmental nature of the EU project. First, the Constitution offered a greater role to national parliaments in reviewing proposed EU legislation, and it provided an enhanced right for a parliament to raise objections to the new laws. The second procedure is enhanced cooperation, a carryover from the Treaties, by which groups of Member States may proceed to act on their own where the EU is unable to achieve the consensus necessary for Union action. Enhanced cooperation was classified in the Constitution as an EU activity, but it evidences a certain weakness at the central level and a measure of autonomy left to the states. The third procedure, also taken from the Treaties, was the Constitution's provision for the Union to suspend a Member State's voting rights on the Council if the state failed to adequately support the EU's core values. Such suspension of rights underscores the fact that the Union lacks ultimate coercive power over its members and that the Constitution retained key characteristics of a treaty. Finally, the Constitution for the first time would have permitted a Member State to withdraw from the Union. Under this right, should a state ever become dissatisfied to the point of wanting back the competences it has already yielded to the Union, or should it conclude that its vital interests are no longer being protected within the EU, it could lawfully resign its membership. This is a singular concept. Although the economic and political ramifications of withdrawal would likely inhibit this provision from ever being invoked, its presence in the Constitution was a bold affirmation of ultimate national sovereignty.

The potential of the Reform Treaty

The foregoing conclusions are based solely upon the text of the Constitution as it compares with the EC Treaty and TEU. The new reality is that the European Council has decided to abandon the Constitution and mandate the drafting of the Reform Treaty. Reflecting the June 2007 Presidency Conclusions,[1133] and based on the new document's major provisions as described in the Introduction to this treatise, the Reform Treaty will likely lead to a reaffirmation of these conclusions. In this regard, a few observations are appropriate:

> --The many constitutional changes described at the beginning of this chapter as *not* affecting the EU's dividing lines are not likely to be adjusted in the Reform Treaty in any manner that would create such an effect.

[1133] June 2007 Presidency Conclusions, supra note 19.

--The name "Constitution" and the inclusion of EU symbols in the Constitution would have emphasised what was arguably a shift toward a new legal order, but all of these manifestations will be absent in the Reform Treaty.

--The elimination of the Pillar structure under the Constitution will, in the Reform Treaty, be replaced by preservation of at least the Second Pillar, the CFSP, as a separate class of EU activity. The Third Pillar will likely disappear, as all provisions relating to justice and home affairs are transferred into the Treaty on the Functioning of the Union (the renamed EC Treaty).

--The Reform Treaty's formulations as to to the primacy of EU law will be stated in a Declaration rather than in primary text as in the Constitution. The Declaration will refer to the principle of primacy as expressed in "well settled case-law" of the Court of Justice.

--Where the Constitution would have included the Charter of Fundamental Rights in its primary text, the Reform Treaty will refer to it and place it in a protocol. This alone is not of great significance, However, due to many other textual references to human rights principles in the Constitution and the Treaties, either approach appears to be complex.

--Interestingly, the movement toward further QMV decision-making under the Constitution will be carried over into the Reform Treaty. The picture on such voting within the AFSJ is not entirely clear, as the Constitution and Reform Treaty on one hand offer more QMV, while the Reform Treaty may offset that development with more exceptions for objecting Member States.

--New areas of EU activity proposed in the Constitution are also proposed for the Reform Treaty. We have argued that these do shift some competences to the EU, but that the level of such activity in areas vital to Member State national sovereignty is not likely to be deep.

--The Constitution's many new reminders of the sovereignty of the Member States and its highlighting of their own competences are destined to be included in the Reform Treaty, with perhaps even more emphasis.

These comments are made with respect to the Presidency Conclusions, which are quite detailed. However, the results of the drafting and negotiating the new treaty remain to be seen. It is hoped that the analysis of the Constitution in this treatise will prove to be of value when a final Reform Treaty text has been published and approved by the IGC.

A broader perspective on the dividing lines

As part of this summing up, we do well to recall the broad questions posed in the Introduction, and as a result of the analysis offered in this treatise we may suggest the answers that will likely emerge from whatever form of constitutional text is eventually ratified:

--*What institutions are necessary to ensure that the EU reaches its potential, and what authority should they be granted? What is the role of the Member States in those institutions?* The institutions created at the very beginning by the Treaties of Paris and Rome have proven to be remarkably effective for the Union. The Commission, possessing the right of legislative initiative and operating with the legislative approval of the Council, offers continuity and professional management. The European Parliament provides popular input, the Council represents the interests of the Member States, and the European Council serves as a summit meeting to set broad policy guidelines. The Court of Justice has served as an effective arbiter and, occasionally, as a mover of European integration. In all of these institutions the individual interests of the Member States are heard to varying extents, and overall the institutional framework displays relatively clear dividing lines between the Union and the Member States. This is a success, and both the Constitution and Reform Treaty would maintain the basic arrangement.

--*What instruments and decision-making procedures should be employed, and which institutions (including those of the Member States) should participate in particular actions?* The hodge-podge of instruments and procedures under the Treaties begs for simplification. The drafters of the Constitution correctly set out to improve this state of affairs, but it appears that their ideas and concepts will not generally be transposed into the Reform Treaty. The increasing influence of the national parliaments on EU legislation (proposed in both the Constitution and the Reform Treaty) poses a more interesting challenge. On the one hand, the broadening of Union activity carries a

risk of marginalising the national legislatures. On the other, the expanded rights of review and objection for national parliaments may prove – especially in an EU of 27 members – to hinder the ability of the EU to act efficiently.

--*In an expanding Union, how should the internal market be managed, and should there be a role for the Member State governments in its management?* The internal market is literally and figuratively the bread and butter of the EU, and its success is a result of central management and the relinquishment of pure national sovereignty in favor of efficiency and equality. However, one of the brilliant strokes of the European Union is its device of central legislation that must be nationally implemented. This promotes efficiency in Brussels and active engagement by national parliaments and authorities. This balance has been highly successful, and it need not be changed. The Constitution and the Reform Treaty have not proposed to do so.

--*At what level should social policy be determined? Should key concepts be uniform throughout the EU, or should the Member States maintain local control?* This is certainly the point at which strains can develop in the Union. Social policy is a two-edged sword. On the one hand, market-related social policy – for example, worker benefits and taxation – demands a measure of central coordination to create a level playing field within the internal market. On the other hand, nothing will create more suspicion and ill will with the average citizen and the average national parliamentarian than situations in which policies impacting daily life are dictated by institutions outside the country. With each extension of EU activity into new areas – for example, health policy – feelings of alienation with regard to Brussels are bound to intensify. Likewise, the increasing diversity in the EU population arising from EU enlargement and internal migration creates seemingly insoluble challenges. Although the Constitution and Reform Treaty have not proposed any bold moves in social policy initiatives – no major shift in the relevant dividing lines – further legislative adjustments and treaty changes are undoubtedly in store.

--*How should foreign affairs and defence be conducted?* This is another dilemma, although perhaps less problematic than social policy. The simple observation is that the EU would be far more effective on the world stage if it could speak with a single voice in foreign affairs and defence. However, at the current time this is not in

the cards. These matters are a key indicator of nationhood, a primary facet of sovereignty. As a bloc, the Union will not achieve a unified approach any time soon, and neither the Constitution nor the Reform Treaty has suggested significant movement toward shifting these critical dividing lines. The best that can be expected is that some sort of core group might be able to pool their resources in a "permanent structured cooperation within the Union framework"[1134] and relinquish more of their sovereignty to create a more closely united foreign policy or defence.

As noted in the Introduction, the foregoing questions relate to political power and institutional authority within the EU, but we also raised questions that relate more deeply to the intrinsic character of the Union. To these questions the Constitution suggests the following answers:

--*Should the Member States continue to enjoy their status as sovereign nations within the world community?* There is no indication whatsoever that any of the Member States wish to form a true federation with supreme central authority. The original members and the later-acceding states appear fully committed to retaining their sovereignty. Both the Constitution and the Reform Treaty would respect this state of affairs, and the line between the current intergovernmental Union and a federal superstate will not be crossed.

--*Where is the loyalty and attachment of the individual European citizen to be focused?* The rights to live, work and invest in other Member States do create a European-ness that did not exist 50 years ago. EU citizenship has value, and it is appreciated. However, for linguistic, cultural and historical reasons, the vast majority of Union citizens identify first and foremost with their separate nations. The EU does well to foster a fealty to the Union, but the Eurocrats must be realistic that national attachment is infinitely stronger than regional identification. The Constitution proposed a greater use of EU symbols to enhance European identity, but these proved to be controversial, and the Reform Treaty omits them. What appeared to be a small shift of this symbolic dividing line will be avoided.

--*Where are the manifestations of democracy to be found – at the national level only, at the EU level, or at both levels?* Here it may well be said that more democracy within the Union system is a good

[1134] Constitution art. I-41(6).

thing. EU citizens should have rights of information and participation with respect to Brussels, and both the Constitution and Reform Treaty would enhance these rights. However, even in a more open Union, true democracy remains rooted more in national practice than in international practice. Thus it seems unnecessary to promote a Union that fully offers the democratic rights that EU citizens enjoy at the national level. To the extent that there is a dividing line between full democratisation at the national level and partial democratisation at the Union level, the EU is moving closer toward that line, but it need not go all the way.

--*How much integration is necessary, and where should it stop?* It is never a good thing to doubt the capacity of EU leaders to push the Union to new heights. New programs in new areas will likely develop, even if it takes unanimity to create them. However, in structural and programmatic terms it is eminently reasonable to argue that some kind of limit has been reached. The Constitution may have challenged that limit, at least in the perception of some Europeans, and the Reform Treaty may represent a modest retreat back toward the status quo. After 50 years the EU has developed to a point at which further integration might well encroach on the residual sovereignty of the Member States, and this is a dividing line that few are willing to cross. Some (who we have referred to as federalists) will always seek "ever closer union," but many others will assert that the Union was born as an intergovernmental organisation, so it must remain, and further integration would threaten that status.

Will the next step be successful?

Given the constantly shifting winds of global affairs, regional politics and national sentiment, it is impossible to predict whether any revision to the EU treaties will be successful or long-lived. The Constitution never took its first breath, and so we look ahead to the proposed Reform Treaty. Will the new document's balance of power be workable? Can its political compromises be sustained? Will there be continuing pressure to hand more power to Brussels, or will there be a trend toward dis-integration or a drift toward special cooperation among a core group of States? In short, will the dividing lines set forth in the Reform Treaty or any other treaty revision withstand the political strains that will inevitably follow?

The enormous challenge presented to those who seek acceptance of the next treaty revision is to sell the system to the Union's citizens. The

difficulty in doing so is directly tied to the fact that the European Union does not resemble any other existing governmental or intergovernmental structure. The editors of the Common Market Law Review have well articulated the task as follows:

> It is nonetheless true that the system will remain difficult to explain to those who have to be convinced first and foremost: the people. Even if the authors of the Constitution found a good balance, it remains, as a result of the nuances it contains, complex. That, however, is the name of the game. It would be easy to build a super-state or to transform the Union into an international cooperation organization, but it is difficult to regulate the workings of a machine which is based on an association of sovereign States and their peoples, aiming at exercising a part of their sovereignty jointly. The difficult task of the political leaders now is to explain in a clear way what they wanted to create, so that their citizens do not decide on the basis of propagandist clichés, but rather on the Union as they wanted it.[1135]

While it is not easy at this point to define the Constitution's legacy, it is clear that the Reform Treaty will build on the Constitution and will for the foreseeable future preserve a European Union that is foundationally similar to the current version. The next version of the Treaties will maintain the EU's current duality, with the Member States retaining their status as sovereign nations in a union with significant central features. Under the reforms currently being proposed, the United States of Europe is not about to be born. The dividing lines between the EU and its Member States will largely be maintained, and thus the middle ground between intergovernmentalism and federalism will be held.

[1135] Editorial Comments, supra note 305, at 907.

Addendum

Addendum

Where the Constitutional Treaty Requires Unanimous Voting, Consensus or Common Accord

[This addendum is referenced in Chapters 5 and 15 of the treatise]

Chapter 15 details those instances in which the Constitution either offers QMV as a change from unanimity under the Treaties or assigns QMV to new fields of EU activity. The focus is on the shifting dividing lines – where Member States may lose their veto or blocking rights. The purpose of this addendum is to offer a reminder that even under the Constitution the concepts of unanimous voting, consensus and common accord are far from dead. There are a significant number of important subjects for which the Constitution preserves the status quo, where protections for the Member States are not lost.

1. Constitution Part I

a. Institutions and bodies.

(i) European Parliament composition. Constitution Article I-20(2) requires a unanimous European Council decision on the composition of the European Parliament.

--EC Treaty Article 190 requires a unanimous decision of the Council, rather than the European Council.

(ii) European Council decisions in general. Constitution Article I-21(4) provides that all European Council decisions are to be taken by consensus.

--There is no counterpart provision in the Treaties.

(iii) Commission composition. Constitution Article I-26(6) requires unanimous European Council decisions to alter the number of Commission members and to determine the rotation of Commission members.

--EC Treaty Article 213(1) and Article 4(3) of the Protocol on Enlargement of the European Union provide for unanimity on these matters, but the decisions are to be taken by the Council.[1136]

(iv) Judges and Advocates General. Constitution Article I-29(2) requires an agreement by all of the Member State governments (common accord) on the appointment of judges to the Court of Justice, General Court judges and Advocates General.

--EC Treaty Articles 223 and 224 contain the same requirements.

b. EU competences.

(i) Flexibility clause. Constitution Article I-18(1) mandates that all legislation under the flexibility clause will require a unanimous vote of the Council.

--EC Treaty Article 308 contains the same requirement and constitutes the Treaties' flexibility clause.

(ii) Recommendations. Constitution Article I-35(3) requires unanimity for recommendations by the Council in cases in which a European law or framework law would require unanimity.

--There is no counterpart in the Treaties.

(iii) CFSP. Constitution Article I-40(6) provides that all decisions by the European Council or Council in the area of the common foreign and security policy are to be taken unanimously, unless otherwise provided in Part III of the Constitution.

--TEU Article 23(1) contains the same provision, although only the Council is mentioned.

(iv) *Passerelle* to QMV in the CFSP. Constitution Article I-40(7) requires unanimity for a European Council decision to allow more QMV on the Council in the area of CFSP.

--There is no counterpart to this *passerelle* in the Treaties.

[1136] Protocol on Enlargement, supra note 376, art. 4(1).

(v) Common defence establishment. Constitution Article I-41(2) mandates a unanimous European Council decision establishing a common defence.

--TEU Article 17(1) is similar, but unanimity is not specified, and there is no general provision requiring the European Council to vote by unanimity.

(vi) Common defence policy. Constitution Article I-41(4) requires unanimity for all Council decisions relating to the common security and defence policy.

--TEU Article 23, subsections (1) and (2), contain the same requirement.

c. EU finances.

(i) System of own resources. Constitution Article I-54(3) requires a unanimous vote of the Council for EU legislation relating to the system of own resources.

--EC Treaty Article 269 contains the same requirement.

--The Constitution and EC Treaty also require approval by all Member States in accordance with their respective constitutional requirements.

(ii) Multiannual financial framework. Constitution Article I-55(2) requires a unanimous vote of the Council for EU legislation establishing the multiannual financial framework.

--There is no counterpart to this provision in the Treaties.

(iii) *Passerelle* to QMV on the multiannual framework. Constitution Article I-55(4) mandates a unanimous European Council decision to allow QMV on the Council relating to the multiannual financial framework.

--There is no counterpart to this *passerelle* in the Treaties.

d. EU membership.

(i) New EU member. Constitution Article I-58(2) requires a unanimous Council decision to approve a new EU member.

--TEU Article 49 contains the same requirement.

--The Constitution and TEU require separate ratification by all Member States in accordance with their constitutional requirements.

(ii) Breach of EU values. Constitution Article I-59(2) provides for a unanimous European Council decision that a Member State has breached principal EU values.

--TEU Article 7(2) provides for such a decision, but it is to be made by the Council "meeting in the composition of the Heads of State or Government." This Council configuration differs from the European Council in that the President of the Commission does not participate in the matter.

--The offending Member State does not participate in the vote under the TEU or the Constitution.

(iii) Extension of withdrawal period. Constitution Article I-60(3) provides for a unanimous European Council decision to extend the two-year withdrawal period of a withdrawing Member State.

--There is no withdrawal provision in the Treaties and thus no counterpart to Constitution Article I-60(3).

2. Constitution Part II

Part II of the Constitution is essentially a set of stated principles relating to fundamental rights. It contains no provisions that mandate or permit the EU to implement legislation or make decisions, and thus there is no explicit or implied reference to voting on the Council.

3. Constitution Part III

a. Non-discrimination and citizenship.

(i) Discrimination. Constitution Article III-124(1) provides for a unanimous vote of the Council on legislation to combat discrimination on the basis of sex, race, religion, disability, age or sexual orientation.

--EC Treaty Article 13 contains the same requirement.

(ii) Free movement of persons. Constitution Article III-125(2) requires a unanimous Council vote on legislation to facilitate the right of free movement of persons.

--EC Treaty Article 18(2) contains similar language.

(iii) Right to vote and stand for election. Constitution Article III-126 requires the Council to vote unanimously on EU legislation detailing the right of an EU citizen to vote and stand for election in another Member State.

--EC Treaty Article 19 contains the same requirement.

(iv) Citizenship rights. Constitution Article III-129 mandates a unanimous Council vote on legislation to add to the citizenship rights described in Article I-10.

--EC Treaty Article 22 is identical.

--The Constitution and EC Treaty require approval by all of the Member States in accordance with their constitutional requirements.

b. Internal market.

(i) Social security calculations. Constitution Article III-136(2) provides for a European Council decision regarding the impact of a draft EU law relating to multi-state social security calculations. Article I-36(1) initially provides for a QMV Council vote, but subsection (2) permits any Member State to demand that the matter be referred to the European Council. A unanimous decision by the European Council is not specified, but unanimity would be required under the general consensus requirement of Article I-21(4).

--EC Treaty Article 42 requires a unanimous Council vote in all instances.

(ii) Restrictions on capital flow. Constitution Article III-157(3) requires a unanimous vote of the Council on legislation restricting the movement of capital to or from third countries.

--EC Treaty Article 57(2) contains the same requirement.

(iii) Support for restrictive measures. Constitution Article III-158(4) provides for a unanimous Council decision affirming that a Member State's restrictive tax measures against a third country are acceptable.

--There is no counterpart to this type of decision in the Treaties.

(iv) Approval of aid granted by a state. Constitution Article III-168(2) mandates a unanimous Council decision to affirm that aid granted by a Member State is acceptable.

--EC Treaty Article 88(2) requires the same type of decision.

(v) Tax harmonisation. Constitution Article III-171(1) requires a unanimous vote of the Council on EU legislation to harmonise certain taxes.

--EC Treaty Article 93 contains the same requirement.

(vi) Harmonisation of laws. Constitution Article III-173 provides for the Council to vote unanimously on legislation to require harmonisation of Member State laws relating to the internal market.

--EC Treaty Article 94 contains the same requirement.

(vii) Language for EU intellectual property rights. Constitution Article III-176 provides for a unanimous Council vote on legislation establishing language arrangements for European intellectual property rights.

--There is no counterpart in the Treaties.

c. Economic and monetary policy.

(i) Economic policy guidelines: Constitution Article III-179(2) requires the European Council to reach a "conclusion" on broad guidelines of the economic policies of the Member States. Unanimity is not specified, but the general consensus requirement of Constitution Article I-21(4) would govern.

--EC Treaty Article 99(2) is the same provision, but unanimity is not specified in this provision.

(ii) Replacement of budget deficit protocol. Constitution Article III-184(13) provides for a unanimous vote of the Council on legislation to replace the protocol on excessive budget deficits.

--EC Treaty Article 104(14) contains the same requirement.

(iii) Expansion of ECB powers. Constitution Article III-185(6) mandates unanimity on the Council with respect to legislation to expand powers of the European Central Bank.

--EC Treaty Article 105(6) contains the same provision.

(iv) New euro-zone member. Constitution Article III-198(3) requires the unanimous agreement of the Council and the euro-zone Member States to approve decisions or regulations fixing the euro exchange rate of the currency of a Member State that will be permitted to join the euro-zone. A unanimous Council vote is not specified, but because only Council members from the euro-zone states will participate in the decision, the requirement of approval by all the euro-zone Member States necessitates a unanimous vote of the euro-zone Council representatives.

--EC Treaty Article 123(5) contains the same requirement.

d. Policies in other areas.

(i) Employment situation. Constitution Article III-206(1) calls for European Council "conclusions" on the employment situation in the EU. Unanimity is not specified, nor is QMV, and therefore the general consensus requirement of Article I-21(4) would govern the action.

--EC Treaty Article 128(1) is the same provision, but unanimity is not specified in this provision or in a general voting provision relating to the European Council.

(ii) Social policy. Constitution Article III-210(3) requires a unanimous vote of the Council on EU legislation in certain areas of EU supporting action relating to social policy; a unanimous Council decision is also required to change certain of those areas to QMV.

--EC Treaty Article 137(2) contains the same requirements.

(iii) Labor-management agreements. Constitution Article III-212(2) requires a unanimous vote of the Council to adopt regulations or decisions relating to certain EU-facilitated labor-management agreements.

--EC Treaty Article 139(2) contains the same provision.

(iv) Structural and Cohesion Funds. Constitution Article III-223(2) mandates a unanimous Council vote on legislation relating to the Structural Funds and Cohesion Fund.

--EC Treaty Article 161 contains the same requirement.

(v) Environment. Constitution Article III-234(2) provides for a unanimous vote of the Council on EU legislation pertaining to certain environmental matters; a unanimous Council decision is also required to institute limited QMV decision-making in these areas.

--EC Treaty Article 175(2) contains the same provisions.

(vi) Transport. Constitution Article III-237 requires a unanimous Council decision to permit a derogation in the area of transport legislation.

--EC Treaty Article 72 is identical.

(vii) Energy. Constitution Article III-256(3) mandates a unanimous vote of the Council on legislation of a fiscal nature relating to energy policy.

--The Treaties contain no counterpart to this requirement, and energy is merely mentioned in a long list of Community activities in Article 3 of the EC Treaty.

e. Area of freedom, security and justice.

(i) AFSJ strategic guidelines. Constitution Article III-258 requires the European Council to "define" the strategic guidelines for legislative and operational planning within the AFSJ. Unanimity or QMV is not specified, and therefore the general consensus requirement of Article I-21(4) would govern.

--There is no direct counterpart in the Treaties, but TEU Article 34(2) specifies unanimous Council decisions within the Third Pillar, which encompasses part of the Constitution's broader field of AFSJ.

(ii) Judicial cooperation in civil matters. Constitution Article III-269(3) mandates a unanimous Council vote on legislation regarding measures concerning family law with cross-border implications; it also requires a unanimous Council decision to shift certain of these matters to QMV.

-- EC Treaty Article 67(5) permits the Council to act by QMV in matters governed by Article 65 (a listing of items relating to judicial cooperation in civil matters), "with the exception of aspects relating to family law." There is no counterpart to the *passerelle* provision of the Constitution.

(iii) Criminal procedure. Constitution Article III-270(2) requires unanimity for Council decisions relating to certain aspects of Member States' mutual recognition of criminal procedures.

--There is no direct counterpart in the Treaties, but TEU Article 34(2) generally requires unanimity in the Third Pillar, which represents a part of the AFSJ.

(iv) Referral of fundamental matters. Constitution Article III-270(3) permits a Member State to refer to the European Council a draft EU law relating to judicial cooperation in criminal matters, if the Member State believes that the legislation will affect fundamental aspects of its criminal justice system. Where the Council might have taken a vote by qualified majority, the European Council must make a decision on the matter. Since the method of European Council voting is not specified, its decision must be made by consensus under Article I-21(4).

--There is no counterpart in the Treaties, but TEU Article 34(2) generally requires unanimity in this aspect of the AFSJ.

(v) New areas of cross-border crime. Constitution Article III-271(1) requires a unanimous Council decision to identify additional areas of cross-border crime.

--There is no counterpart in the Treaties, but TEU Article 34(2) generally requires unanimity in this aspect of the AFSJ.

(vi) Referral of fundamental matters. Constitution Article III-271(3) permits a Member State to refer to the European Council a draft EU law relating to the definition of criminal offences and sanctions, if the Member State believes that the legislation will affect fundamental aspects of its criminal justice system. Where the Council might have taken a vote by qualified majority, the European Council must make a decision on the matter. Since the method of European Council voting is not specified, its decision must be made by consensus under Article I-21(4).

-- There is no counterpart in the Treaties, but TEU Article 34(2) generally requires unanimity in this aspect of the AFSJ.

(vii) Prosecutor's Office. Constitution Article III-274(1) requires a unanimous Council decision to establish European Public Prosecutor's Office.

-- There is no counterpart in the Treaties, but TEU Article 34(2) generally requires unanimity in this aspect of the AFSJ. Otherwise, this type of decision might require unanimity under the EC Treaty flexibility clause, EC Treaty Article 308, because this is an area of activity not otherwise covered in the Treaties.

(viii) Extension of prosecutor's powers. Constitution Article III-274(4) mandates a unanimous European Council decision to extend the powers of the European Prosecutor.

-- There is no counterpart in the Treaties, but TEU Article 34(2) generally requires unanimity in this aspect of the AFSJ. Otherwise, this might require unanimity under the EC Treaty flexibility clause, EC Treaty Article 308, as an area of activity not covered in the Treaties.

(ix) Police cooperation. Constitution Article III-275(3) requires a unanimous vote of the Council on legislation concerning operational cooperation between police authorities of the Member States.

--TEU Article 31(1) contains counterpart language, but unanimity comes through the general unanimity requirement of TEU Article 34(2).

(x) Police operations in another state. Constitution Article III-277 requires a unanimous Council vote on legislation regarding operations of one Member State's authorities in another Member State.

-- TEU Article 32 contains counterpart language, but unanimity comes through the general unanimity requirement of TEU Article 34(2).

f. Overseas countries and territories.

(i) Terms of association. Constitution Article III-291 mandates a unanimous vote of the Council on legislation regarding the association of overseas countries and territories with the EU. Such legislation may include matters referred to in Article III-290 relating to free movement of workers between Member States and the overseas countries and territories.

--EC Treaty Article 187 contains the general requirement as to legislation, but Article 186 provides that matters of freedom of movement of workers are to be "governed by agreements to be concluded subsequently with the unanimous approval of Member States."

(ii) Change of status. Constitution Article IV-440(7) permits the European Council to unanimously adopt a European decision changing the status of one of the overseas countries or territories.

--There is no counterpart provision in the Treaties.

g. External action.

(i) Strategic interests and objectives. Constitution Article III-293(1) mandates unanimous European Council decisions to set the strategic interests and objectives of EU external action.

--TEU Article 11 deals with the common foreign and security policy only, rather than the whole of EU external action. Unanimity is provided in TEU Article 23(1) with respect to decisions of the Council on the CFSP. The European Council is not mentioned.

(ii) CFSP guidelines. Constitution Article III-295(1) requires the European Council to "define" the guidelines for the CFSP. Unanimity is not specified, and thus the general consensus requirement of Article I-21(4) would govern.

--TEU Article 23(1) requires unanimous Council decisions on the CFSP. The European Council is not mentioned.

(iii) CFSP decisions. Constitution Article III-295(2) provides for unanimous Council decisions to implement the CFSP guidelines adopted under Article III-295(1). Unanimity on the Council is mandated in Articles I-40(6) and III-300(1).

--TEU Article 23(1) requires unanimous Council decisions on the CFSP.

(iv) CFSP decisions. Constitution Article III-300(1) requires unanimity for Council decisions on the CFSP in general.

--TEU Article 23(1) contains the same requirement.

(v) Objection to a QMV decision. Constitution Article III-300(2) provides for a unanimous European Council decision on a QMV matter referred to the European Council from the Council after a Member State's objection on reasons of "vital and stated reasons of national policy."

--TEU Article 23(2) contains the same requirement.

(vi) *Passerelle* to more QMV. Constitution Article III-300(3) permits a unanimous European Council decision expanding QMV decision-making on the Council in the area of CFSP.

--There is no counterpart *passerelle* provision in the Treaties.

(vii) Permanent structured cooperation in defence. Constitution Article III-312(6) requires unanimous Council decisions within the framework of permanent structured cooperation in the field of defence, except in matters for which QMV is specified. Only the participating Member States may take part in this decision-making.

--TEU Article 17 deals with related matters, but not permanent structured cooperation as such. Unanimity in defence is provided in TEU Article 23(1).

(viii) Common commercial policy. Constitution Article III-315(4) mandates unanimous Council decisions on international agreements in fields where internal EU decisions would require unanimity.

-- EC Treaty Article 133(5) contains the same requirement.

(ix) International agreements. Constitution Article III-325(8) requires unanimity for Council decisions relating to the making of international agreements in fields where internal EU decisions would require unanimity.

--EC Treaty Article 300(2) and TEU Article 24(2) contain the same unanimity requirement.

(x) Euro exchange rate agreements. Constitution Article III-326(1) requires a unanimous Council decision on euro exchange rates with third countries.

--EC Treaty Article 111(1) contains the same requirement.

h. Union institutions.

(i) Parliament election procedures. Constitution Article III-330(1) mandates a unanimous vote of the Council on legislation setting uniform procedures for electing members of the European Parliament.

--EC Treaty Article 190(4) is identical.

--The Constitution and EC Treaty require Member States to ratify these procedures in accordance with their own constitutional requirements.

(ii) Taxation of parliamentarians. Constitution Article III-330(2) mandates a unanimous decision of the Council on taxation of members and former members of the European Parliament.

--EC Treaty Article 190(5) contains the same requirement.

(iii) Commission vacancy. Constitution Article III-348(2) requires a unanimous Council decision not to fill a vacancy on the Commission.

--EC Treaty Article 215 is identical.

(iv) Advocates General. Constitution Article III-354 requires a unanimous decision of the Council to increase the number of Advocates General.

--EC Treaty Article 222 contains the same requirement.

(v) Appointment of Court positions. Constitution Article III-355 requires common accord of the governments of the Member States to appoint judges and to the Court of Justice, as well as Advocates-General.

--EC Treaty Article 223 contains the same requirement.

(vi) Appointments to General Court. Constitution Article III-356 requires common accord of the Member States to appoint Judges to the General Court.

--EC Treaty Article 224 contains the same requirement, although in the EC Treaty the court is called the Court of First Instance.

(vii) Appointments to specialised courts. Constitution Article III-359(4) mandates unanimity in a Council decision to appoint members to specialised courts.

--EC Treaty Article 225a is identical.

(viii) Committee of the Regions. Constitution Article III-386 provides for a unanimous Council decision to determine the composition of the Committee of the Regions.

--EC Treaty Article 263 does not contain such a requirement. However, no decision is necessary under the treaty, because the actual composition of the committee is specified in this treaty article. Any amendment to the specified composition will require an amendment to the EC Treaty, which will involve ratification by all of the Member States.

(ix) Economic and Social Committee. Constitution Article, III-389 mandates a unanimous Council decision to determine the composition of the Economic and Social Committee.

--EC Treaty Article 258 does not contain such a requirement. However, no decision is necessary under the treaty, because the composition of the committee is specified in this treaty article. Any amendment to the specified composition will require and amendment to the EC Treaty, which will involve ratification by all of the Member States.

(x) European Investment Bank. Constitution Article III-393 requires a unanimous vote of the Council on EU legislation to amend the Statute of the European Investment Bank.

--EC Treaty Article 266 deals with the ECB Statute, but only certain provisions of the Statute are specified for amendment by unanimous Council action.

(xi) Amendment of Commission proposal. Constitution Article III-395(1) requires unanimity on the Council to amend most legislative proposals from the Commission.

--EC Treaty Article 250(1) contains the same requirement.

(xii) Approval of amendments proposed by Parliament. Constitution Article III-396(9) mandates a unanimous Council decision on legislative amendments proposed by the European Parliament but opposed by the Commission.

--EC Treaty Article 251(3) is identical as to the unanimity requirement.

i. Financial provisions.

(i) Budget legislation. Constitution Article III-412(1) requires a unanimous vote of the Council on legislation relating to implementation of the EU budget. Unanimity will be required until the beginning of 2007, when QMV will become the rule.

--EC Treaty Article 279(1) contains the same requirement. Unanimity is likewise replaced with QMV at the beginning of 2007.

j. Enhanced cooperation.

(i) Enhanced cooperation in CFSP. Constitution Article III-419(2) requires a unanimous Council decision (participating Member States only, under Article I-44(3)) permitting a program of enhanced cooperation in the area of the common foreign and security policy.

--TEU Articles 23(2) and 27c require Council decisions (participating Member States only, under TEU Article 44(1)) to be taken by QMV.

(ii) Permission to join a program in progress. Constitution Article III-420(2) requires a unanimous Council decision (participating Member States only, under Article I-44(3)) to permit a Member State to join a program of enhanced cooperation that is already in progress.

--TEU Article 23(2) and 27e provide for such Council decisions (participating Member States only, under TEU Article 44(1)) to be taken by QMV.

(iii) Program costs. Constitution Article III-421 mandates unanimity for Council decision (all Member States) to charge the Union budget with the costs (other than administrative costs) arising from a program of enhanced cooperation.

--TEU Article 44a contains the same requirement.

(iv) *Passerelle* to QMV. Constitution Article III-422(1) requires a unanimous decision of the Council (participating Member States only) to shift voting within a program of enhanced cooperation from unanimity to QMV.

--There is no counterpart to this *passerelle* in the Treaties.

(v) *Passerelle* to ordinary legislative procedure. Constitution Article III-422(2) mandates a unanimous Council decision (participating Member States only) to shift the legislative procedure within a program of enhanced cooperation from a special procedure to the ordinary legislative procedure.

--The Treaties do not contain such a *passerelle*.

k. Common provisions; general and final provisions.

(i) Location of EU institutions. Constitution Article III-432 requires a common accord decision of the governments of the Member States with respect to the location of EU institutions.

--EC Treaty Article 289 contains the same requirement.

(ii) Languages of the EU institutions. Constitution Article III-433 mandates a unanimous Council decision to adopt a regulation setting the rules for use of languages in the EU institutions other than the European Court of Justice.

--EC Treaty Article 290 contains the same requirement.

(iii) List of arms, munitions and war material. Constitution Article III-436(2) requires a unanimous Council decision to change a 1958 list of arms, munitions and war materials that qualify for Member State protective measures.[1137]

--EC Treaty Article 296 contains the same requirement.[1138]

4. Constitution Part IV

(i) Amendment by Convention. Constitution Article IV-443(2) requires that in the ordinary procedure to amend the Constitution, a Convention must approve a proposed amendment by consensus before it is referred to an intergovernmental conference for further consideration.

--The Treaties do not provide for a constitutional convention.

[1137] Constitution art. III-436(2).

[1138] Both the Treaty and Constitution focus on the "essential interests" of Member State security while prohibiting unnecessary adverse impact on competition within the internal market.

(ii) IGC and Member State approval of an amendment. Constitution Article IV-443(3) requires an IGC (acting with or without a prior Convention) to approve a proposed constitutional amendment by common accord. The same article requires that all amendments be ratified by all Member States.

--TEU Article 48 contains these same requirements.

(iii) Simplified amendment. Constitution Article IV-444 permits the European Council to unanimously decide to change (1) any unanimous Council voting requirement in Part III of the Constitution to a qualified majority voting requirement and (2) any special legislative procedure in Part III to the ordinary legislative procedure. After such a decision by the European Council the matter must be referred to the national parliaments of the Member States, and any opposition expressed within six months will nullify the amendment.

--The Treaties do not contain such a procedure.

(iv) Amendment of internal policies. Constitution Article IV-445(2) permits the European Council by unanimity to approve an amendment to Title III of Part III of the Constitution in regard to internal policies and action of the Union. After such a vote of the European Council, the amendment must be ratified by all Member States.

--The Treaties do not contain such a procedure.

(v) Ratification. Constitution Article IV-447 requires ratification of the Constitution by all Member States.

--EC Treaty Article 313 and TEU Article 52 contain the same unanimity requirement for their respective ratification.

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SAMENVATTING

(Summary in Dutch)

Inleiding

De vraag die in dit proefschrift centraal staat is hoe het Verdrag tot vaststelling van een Grondwet voor Europa (het 'grondwettelijk verdrag') de scheidslijnen tussen de Europese Unie en de lidstaten zou hebben beïnvloed. Deze scheidslijnen hebben betrekking op de verdeling van macht in het kader van het EU-systeem. Bepaalde bevoegdheden en verantwoordelijkheden zijn toebedeeld aan de Europese Unie, terwijl andere zijn voorbehouden aan de lidstaten zelf. Deze scheidslijnen zijn, naar aanleiding van de sluiting van opvolgende verdragen sinds de oprichting van de Gemeenschap nu een halve eeuw geleden, zorgvuldig in kaart gebracht. Het grondwettelijk verdrag zou enige invloed hebben gehad op deze scheidslijnen, hetgeen kan worden aangetoond door zorgvuldig de teksten van de belangrijkste bestaande verdragen (het EG-verdrag en het EU-Verdrag, zoals in de loop der tijd gewijzigd) te vergelijken met de tekst van het grondwettelijk verdrag. Deze tekstuele vergelijking kan worden aangevuld door de bestudering van andere officiële en wetenschappelijke bronnen, zoals protocollen, boeken en wetenschappelijke artikelen.

De conclusie die uit het onderzoek naar voren komt is dat het grondwettelijk verdrag geen grote wijziging van de scheidslijnen ten gevolge zou hebben gehad. Het grondwettelijk verdrag zou een nieuwe rechtsorde voor de Europese Unie hebben opgeleverd, met name door het fuseren van de Gemeenschap en de Europese Unie, maar ook door de voorrang van EU-recht boven nationaal recht te benadrukken. Niettemin zou deze nieuwe rechtsorde niet hebben geleid tot een duidelijke verschuiving van bevoegdheden en macht naar 'Brussel', ten koste van de lidstaten.

In verband met deze bevindingen moet worden vastgesteld dat het belangrijk is om het grondwettelijk verdrag te blijven bestuderen. Dit ondanks het feit dat de Europese Raad in juni 2007 heeft besloten om het grondwettelijk verdrag te laten vallen ten gunste van een alternatieve tekst, het 'Hervormingsverdrag'. Niettegenstaande deze vervanging van het grondwettelijk verdrag namelijk moet erkend worden dat dit document een serieuze poging deed om een nieuwe koers voor de Europese Unie uit te stippelen. Er was veel aandacht besteed aan de inhoud en de aansturing van

het EU-beleid, en het document was in de Intergouvernementele Conferentie van eind 2004 door alle lidstaten ondertekend. Naast dit historische feit zijn er nog twee andere belangrijke redenen om de analyse van het grondwettelijk verdrag voort te zetten. In de eerste plaats ziet het er naar uit dat een groot deel van de inhoud van dit document zal terugkeren in het Hervormingsverdrag. In de tweede plaats is het grondwettelijk verdrag doorlopend onderwerp geweest van vele discussies en debatten. Zulke debatten en analyses zijn relevant voor de voortgang van het proces van Europese integratie.

Het identificeren van de scheidslijnen en wat de gevolgen van het grondwettelijk verdrag zouden zijn geweest om deze te beïnvloeden

Het formele debat - wat is de Europese Unie? Het grondwettelijk verdrag moet bezien worden in het licht van het voortgaande debat over de vraag of de Europese Unie een intergouvernementele organisatie is respectievelijk zal blijven, danwel of de Unie zich zal ontwikkelen tot een federatie die op een supranationale superstaat lijkt. Elk van deze alternatieven wordt aangehangen door een groot aantal wetenschappers. Het intergouvernementele kamp wijst daarbij op de oorsprong van de EU als intergouvernementele organisatie en op het feit dat haar lidstaten internationaal nog steeds als soevereine staten worden beschouwd. Het federale kamp wijst erop dat de nationale soevereiniteit binnen de Europese Unie geleidelijk plaats heeft gemaakt voor een centrale aansturing, vanuit Brussel, van kernactiviteiten zoals de interne markt. De federalisten stellen niet dat de Europese Unie reeds geheel federaal is georganiseerd, maar wel dat het die kant op gaat. Sommige federale denkers beklemtonen ook dat de Europese Unie alleen als een volledig geïntegreerde Verenigde Staten van Europa tot volle wasdom kan komen. Tegen de achtergrond van deze twee theorieën wordt duidelijk dat de Europese Unie een ‘gemengde’ entiteit is die zowel karakteristieken vertoont van een intergouvernementele organisatie als van een federaal systeem. De Europese Unie behoeft intussen niet geheel intergouvernementeel of geheel supranationaal te zijn, maar kan voortgaan te gedijen als een project van soevereine staten die ervoor gekozen hebben om hun soevereiniteit op bepaalde gebieden te delen.

Het ontstaan van het grondwettelijk verdrag. Het grondwettelijk verdrag is er gekomen als reactie op de Verklaring van Laeken van de Europese Raad van 2001 waarbij de Conventie betreffende de Toekomst van Europa werd opgericht. De Conventie kwam bijeen in 2002 en 2003 en stelde de tekst van een verdrag op dat uiteindelijk werd ondertekend door de vertegenwoordigers van alle lidstaten op de conferentie van 29 oktober 2004

Na deze goedkeuring door de intergouvernementele conferentie werd het document aan de lidstaten voorgelegd ter ratificatie. Het falen van de ratificatieprocedure heeft er uiteindelijk toe geleid dat een 'Hervormingsverdrag' zal worden opgesteld.

De structuur van het grondwettelijk verdrag. Deel I is vernieuwend in de zin dat een overzicht wordt gegeven van respectievelijk de algemene doelstellingen van de Europese Unie; de rechten behorend bij het EU-burgerschap; de bevoegdheden van de EU (waarbij een onderscheid is gemaakt met de bevoegdheden van de lidstaten); de instellingen van de EU; de wijze van uitoefening van de EU-bevoegdheden; het democratische bestel van de EU; de financiën van de Unie; de betrekkingen van de Unie met de buurlanden; en andere belangrijke aspecten van het EU-lidmaatschap. Deel II heeft betrekking op de tekst van het Handvest van de Grondrechten van de Unie. Deel III bevat het grootste gedeelte van de materiële bepalingen van het huidige EU-Verdrag en het EG-Verdrag. Deel IV behandelt technische zaken, zoals de intrekking van de bestaande verdragen en de wijzigingsprocedures betreffende het grondwettelijk verdrag.

Een overzicht van de belangrijkste vernieuwingen van het grondwettelijk verdrag. Deel I van het grondwettelijk verdrag bevat een nieuw overzicht van de Europese Unie en haar karakteristieken. De belangrijkste aspecten van dit deel zijn de volgende: (1) Het grondwettelijk verdrag presenteert de figuur van een nieuwe, vaste en niet roterende, voorzitter van de Europese Raad alsmede een Minister van Buitenlandse Zaken van de EU. (2) De afbakening van de EU-bevoegdheden ten opzichte van die van de lidstaten is duidelijker omschreven dan ooit tevoren in een Europees verdrag. (3) Voorzieningen zijn getroffen voor een vereenvoudiging van de juridische instrumenten van de EU, ter vervanging van de meer complexe regelingen onder de drie pijlers van de bestaande verdragen. (4) Democratische rechten van EU-burgers zijn duidelijker omschreven, waaronder het recht inzake toegang tot de documenten van de EU-instellingen alsmede het recht van burgers om voorstellen voor EU-regelgeving te doen. Ook de integratie van het Handvest van de Grondrechten van de EU in Deel II van het grondwettelijk verdrag betreft een belangrijke vernieuwing. Een catalogus van fundamentele rechten heeft tot nu toe namelijk nooit deel uitgemaakt van de verdragen. Deel III brengt drie belangrijke veranderingen met zich mee: (1) EU-activiteiten zouden zijn toegestaan op nieuwe beleidsterreinen zoals ruimte, energie, toerisme, sport, civiele bescherming, administratieve samenwerking en (bepaalde aspecten van) de publieke gezondheidszorg. (2) Wat de ruimte van vrijheid, veiligheid en rechtvaardigheid betreft zouden de onderdelen die nu onder de derde pijler

vallen, worden ondergebracht bij de ‘normale’ EU-activiteiten, waardoor meer activiteiten onder de gekwalificeerde meerderheidsregel zouden vallen en de bevoegdheid van het Hof van Justitie zou zijn uitgebreid. (3) Het gemeenschappelijk buitenlands en veiligheidsbeleid wordt niet afgescheiden van de andere EU-activiteiten, zoals nu het geval is onder het tweede pijler-regime. Het wordt onderworpen aan de ‘gewone’ spelregels van het grondwettelijk verdrag en ook hier wordt de invloed van het Hof van Justitie enigszins uitgebreid. Echter, veel zaken op het gebied van het buitenlands en veiligheidsbeleid, waaronder zaken betreffende defensie, blijven onderworpen aan besluitvorming met unanimiteit in de Raad.

Hoe het grondwettelijk verdrag de scheidslijnen identificeert. De scheidslijnen zoals omschreven in het grondwettelijk verdrag hadden de volgende verschijningsvormen: (1) De EU heeft haar eigen waarden en doelstellingen, maar deze zijn althans deels gebaseerd op de waarden en doelstellingen van de lidstaten. (2) De EU vertoont eigen karakteristieken, maar ook deze zijn beïnvloed door de lidstaten. (3) De EU vertoont democratische karakteristieken die slechts deels vergelijkbaar zijn met die van de lidstaten. (4) De EU is een flexibele organisatie die kan uitbreiden (door toetreding) en kleiner kan worden als een lidstaat gebruik maakt van zijn recht tot uittreding. Dit recht om uit te treden onderstreept dat de lidstaten in dit opzicht soeverein zijn. (5) Het wijzigen van het grondwettelijk verdrag is mogelijk, maar het betreffende besluit behoeft de goedkeuring van alle lidstaten. (6) Een aantal basisbeginselen van de EU, waaronder overdracht van bevoegdheden, exclusiviteit, subsidiariteit, proportionaliteit, flexibiliteit en voorrang van EU-regelgeving, zijn zodanig omschreven dat zij aangeven hoe ze zich verhouden tot de nationale autonomie. (7) De EU-instellingen hebben een mate van autonomie, maar worden in zekere zin ook beïnvloed door de lidstaten. (8) Op materiële beleidsterreinen bestaan er duidelijke scheidslijnen tussen wat de EU wel en niet mag doen. Op veel beleidsgebieden bestaat een mengeling van bevoegdheden van EU en lidstaten. Per terrein verschilt de situatie, van de vrijwel door de EU gedomineerde interne markt tot aan het gemeenschappelijk buitenlands en veiligheidsbeleid, waar de lidstaten hun zeggenschap in essentie hebben behouden.

Opmerkelijke veranderingen die de scheidslijnen kunnen beïnvloeden. Er zijn duidelijke voorbeelden waar het grondwettelijk verdrag de scheidslijnen zou hebben veranderd, óf richting centrale bevoegdheden óf (in bepaalde gevallen) naar meer bevoegdheden voor de lidstaten. Een paar voorbeelden: (1) De ontwikkeling van een ‘nieuwe rechtsorde’ zou tot meer macht voor ‘Brussel’ hebben geleid. Elementen van deze rechtsorde betreffen

onder andere het gebruik van de term ‘grondwet’, de fusie van de Gemeenschap met de Europese Unie, het ongedaan maken van de drie pijlers, de toekenning van rechtspersoonlijkheid aan de Europese Unie, het opnemen van het beginsel inzake voorrang van EU-regelgeving in de tekst van het grondwettelijk verdrag, de duidelijker afbakening van EU-bevoegdheden, een ruimere flexibiliteitclausule dan in de bestaande verdragen en, tenslotte, de uitbreiding van het aantal beleidsterreinen waar besluitvorming met gekwalificeerde meerderheid in de Raad mogelijk zou zijn geworden. (2) Institutionele veranderingen die ‘Brussel’ zouden hebben versterkt of de zeggenschap van de lidstaten zouden hebben beperkt betreffen de aanstelling van een ‘vaste’ voorzitter van de Europese Raad, de aanstelling van een Minister van Buitenlandse Zaken van de EU, en de beperking van het aantal leden van de Commissie. (3) Belangrijke zaken betreffen verder de opneming van het Handvest van de Grondrechten van de Unie in het grondwettelijk verdrag; de opneming van een aantal nieuwe EU-beleidsterreinen; een nieuwe definitie van het begrip ‘gemengde’ bevoegdheden; de uitbreiding van de bevoegdheden van het Hof van Justitie op het gebied van de ruimte van vrijheid, veiligheid en rechtvaardigheid en het gemeenschappelijk buitenlands en veiligheidsbeleid; het grotere gebruik van gekwalificeerde meerderheidbesluitvorming op het gebied van de ruimte van vrijheid, veiligheid en rechtvaardigheid; en de mogelijkheid voor de EU om een eigen operationele defensiecapaciteit te ontwikkelen.

Daarentegen versterkte het grondwettelijk verdrag, enigszins verrassend, de positie van de lidstaten op de volgende manieren: (1) De lidstaten zouden op basis van gelijkheid en volledig wederzijds respect moeten worden behandeld. (2) De tradities van de lidstaten op het gebied van de mensenrechten zouden gerespecteerd moeten worden. (3) ‘Een steeds hechtere Unie’ zou als aparte doelstelling van de Europese Unie zijn verdwenen. (4) De duidelijker vastlegging van de EU-bevoegdheden betekende ook dat helder is welke activiteiten de Europese Unie niet mag ondernemen. (5) Nationale parlementen zouden een ruimere bevoegdheid hebben gekregen om tevoren kennis te nemen van voorgestelde EU-regelgeving en, in bepaalde omstandigheden, daartegen bezwaar te maken op grond van het subsidiariteitsbeginsel. (6) Consensus als beginsel voor de besluitvorming door de Europese Raad zou voor het eerst in het verdrag zijn opgenomen, hetgeen betekent dat hier het vetorecht van de lidstaten zou zijn erkend. (7) Stemming bij unanimiteit in de Raad zou gehandhaafd blijven voor een aantal onderwerpen van de ruimte van vrijheid, veiligheid en rechtvaardigheid, het gemeenschappelijk buitenlands en veiligheidsbeleid, en ten aanzien van bepaalde specifieke onderdelen van de interne markt. De uiteindelijke conclusie is evenwel dat het grondwettelijk verdrag geen grote verschuiving

van bevoegdheden of macht naar het centrale EU niveau te zien zou hebben gegeven.

Het karakter van de Europese Unie

Waarden en doelstellingen. In de preambule van het grondwettelijk verdrag en in een aantal bepalingen wordt de Europese Unie omschreven als entiteit die beschikt over waarden als de menselijke waardigheid, gelijkheid en de rechtsstaat. Deze worden echter omschreven als zijnde gemeenschappelijk met die van de lidstaten, in plaats van als iets unieks van de Europese Unie. Verder worden de nationale tradities van de lidstaten op verschillende manieren benadrukt. De belangrijkste uitdrukking van waarden en doelen betreft de opneming van het Grondvest van de Grondrechten van de EU in het grondwettelijk verdrag. Echter moet het belang van deze vaststelling enigszins worden gerelativeerd in het licht van het feit dat het Handvest reeds door alle lidstaten was onderschreven, namelijk in de plechtige verklaring van de Europese Raad van december 2000. Ook betuigt het grondwettelijk verdrag respect voor de constitutionele tradities van de lidstaten. Afgezien van de opneming van het Handvest, verschillen de waarden en doelstellingen van het grondwettelijk verdrag intussen niet wezenlijk van die van de huidige verdragen.

De kenmerken van de Europese Unie die gelijkenis vertonen met die van de lidstaten. Het grondwettelijk verdrag verschafte formeel rechtspersoonlijkheid aan de Europese Unie, hetgeen voorheen alleen gebeurd was ten aanzien van de Gemeenschap. Het grondwettelijk verdrag voerde ook de Europese vlag, de hymne en andere symbolen in, allemaal zaken die in de huidige verdragen niet zijn geregeld. Niettemin gaan deze ‘staatachtige’ kenmerken gepaard met talrijke verwijzingen naar de soevereiniteit en de identiteit van de lidstaten binnen het Europese systeem. EU-burgerschap is aanvullend en komt niet in de plaats van het nationale burgerschap. De onafhankelijkheid van de begroting van de Europese Unie wordt enigszins gerelativeerd door het feit dat de lidstaten ten aanzien van verschillende begrotingsonderwerpen unaniem moeten besluiten. In zijn algemeenheid zou de EU uit het grondwettelijk verdrag te voorschijn zijn gekomen als een sterkere en beter ontwikkelde entiteit. Evenwel zou dit geen bedreiging hebben opgeleverd voor de soevereiniteit van de lidstaten.

De Europese Unie als democratie. Het gebrek aan transparantie binnen de EU en het ‘democratisch deficit’ hebben er mede toe geleid dat het grondwettelijk verdrag is opgesteld. Het is echter maar de vraag of het systeem van democratie zoals de lidstaten dat hebben ontwikkeld,

noodzakelijk of zelfs mogelijk is op EU-niveau. De afwezigheid van een echte ‘demos’ staat in de weg aan de uitoefening van democratie als een exclusieve EU-zaak. Daarnaast is geen enkel democratisch systeem in staat om alle individuen te allen tijde volledige en gelijke rechten toe te kennen. Delegatie aan wetgevers en bestuurders is nodig om de democratie te laten functioneren. De Europese Unie kent reeds democratische elementen, zoals het Europees Parlement en bepaalde rechten van individuele burgers. Het grondwettelijk verdrag beoogde deze individuele rechten te versterken (onder andere via het recht om informatie aan de Europese instellingen te vragen) en de bevoegdheden van het Europees Parlement uit te breiden. Niettemin suggereerden deze vernieuwingen op geen enkele wijze dat de Europese Unie een superstaat zou worden of dat de democratie op nationaal niveau minder belangrijk zou zijn geworden.

Een flexibele entiteit. Als entiteit beschikt de Europese Unie over een bepaalde mate van flexibiliteit. Ze kan groter worden via toetredingen, en onder het grondwettelijk verdrag kon de Europese Unie ook lidstaten verliezen door de voorgestelde uittredingsclausule. Onder het grondwettelijk verdrag (maar ook reeds onder de huidige verdragen) kan het stemrecht van een lidstaat worden opgeschort indien die lidstaat fundamentele beginselen van de EU schendt. Ook kunnen lidstaten besluiten niet mee te doen aan sommige EU-programma’s (de EMU, en de euro, is in dit verband een belangrijk voorbeeld). Al deze uitingen van flexibiliteit maken duidelijk dat de Europese Unie een op verdragen gebaseerde organisatie is waarvan de lidstaten niet gedwongen kunnen worden om, zonder hun voorafgaande instemming, mee te doen aan belangrijke activiteiten. Het grondwettelijk verdrag zou de rechten van de lidstaten in dit opzicht niet hebben beperkt. De uittredingsclausule kan zelfs gezien worden als een versterking van de soevereiniteit van de lidstaten.

Wijziging van het grondwettelijk verdrag - het unanimiteit vereiste. Het grondwettelijk verdrag bevatte verschillende vereenvoudigde procedures om het verdrag in de toekomst te wijzigen, met inbegrip van regelingen die niet in de huidige verdragen voorkomen. Men kreeg de indruk dat lidstaten hun recht om een verdragswijziging te blokkeren, zouden kunnen verliezen. Echter kent elk van de voorgestelde nieuwe procedures een moment waarbij iedere lidstaat zijn toestemming moet geven. De belangrijke scheidslijn die wil dat lidstaten beleidsvrijheid hebben ten aanzien van verdragswijzigingen, zou dan ook niet veranderen.

Beginselen die aan de basis liggen van het EU-optreden. Verscheidene kernbeginselen die bepalend zijn voor het optreden van de

Europese Unie zouden zijn overgeheveld, van de bestaande verdragen naar het nieuwe grondwettelijk verdrag. Het beginsel dat nieuwe EU-bevoegdheden alleen kunnen ontstaan indien deze uitdrukkelijk zijn toegekend, is onderstreept. De beginselen inzake subsidiariteit en proportionaliteit zijn ook behouden. Beide beginselen geven aan dat er beperkingen kunnen worden gesteld aan het optreden van de Europese Unie. Het beginsel inzake voorrang van EU-recht is neergelegd in het grondwettelijk verdrag, en kwam niet voor in de huidige verdragen (maar kwam voort uit de jurisprudentie van het Hof van Justitie). Dit gegeven benadrukt het gezag van de Europese Unie, maar het is niet duidelijk of de tekstuele uitwerking van het voorrangs-beginsel dat beginsel meer impact zou geven. De exclusiviteit van het EU-optreden –af te leiden uit de bepalingen betreffende de verdeling van bevoegdheden over de EU en de lidstaten- wordt duidelijker geregeld in het grondwettelijk verdrag. Dit was een welkome verbetering, maar suggereerde niet dat meer bevoegdheden van de EU zouden ontstaan. Ten slotte, flexibiliteit voor de EU om op te treden buiten de gebieden waar zij bevoegdheden heeft, wordt niet gegeven in het grondwettelijk verdrag.

Instellingen en besluitvorming

EU-instellingen en organen. De invoering van de nieuwe, vaste, voorzitter van de Europese Raad en de nieuwe minister van Buitenlandse Zaken van de EU leidt tot meer cohesie dan onder de huidige verdragsregelingen het geval is. Echter worden geen bijzondere nieuwe bevoegdheden voor deze nieuwe posities voorgesteld. De nieuwe formule voor de gekwalificeerde meerderheid binnen de Raad (waarbij een gekwalificeerde meerderheidsstemming wordt gerealiseerd door goedkeuring van 55 procent van de lidstaten die 65 procent van de totale EU-bevolking vertegenwoordigen) raakt de positie van de lidstaten, maar leidt niet tot uitbreiding van de EU-bevoegdheden. De verkleining van de omvang van de Commissie was in beginsel al geregeld in de bestaande verdragen. Wellicht de belangrijkste institutionele ontwikkeling onder het grondwettelijk verdrag betreft de uitbreiding van de bevoegdheden van het Hof van Justitie op de terreinen van de ruimte van vrijheid, veiligheid en rechtvaardigheid en het gemeenschappelijk buitenlands en veiligheidsbeleid. Evenwel gaat het hier, opnieuw, niet om een vergaande wijziging.

Instrumenten en procedures van de Europese Unie. De vereenvoudiging van de juridische instrumenten en de besluitvormingsprocedures onder het grondwettelijk verdrag had een bijdrage kunnen zijn tot een efficiëntere en meer inzichtelijke Europese Unie. Echter

zouden deze vernieuwingen niet hebben geleid tot overdracht van nieuwe bevoegdheden naar 'Brussel'.

Waar gekwalificeerde meerderheid besluitvorming met unanimiteit vervangt en van toepassing is op nieuwe beleidsterreinen. Stemming met unanimiteit in de Raad betreft een belangrijk middel ter bescherming van de soevereiniteit van de lidstaten. Het grondwettelijk verdrag stelde een aantal beleidsterreinen voor waar stemming bij unanimiteit zou worden vervangen door gekwalificeerde meerderheid. Ingevolge het grondwettelijk verdrag zou de gekwalificeerde meerderheid ook op een aantal nieuwe beleidsgebieden van de EU van toepassing worden. Overigens zou het effect van deze vernieuwingen slechts beperkt zijn. De ontwikkeling naar meer gekwalificeerde meerderheid komt regelmatig voor in de geschiedenis van de Europese Unie. In dat opzicht behelsde het grondwettelijk verdrag niet meer dan een voortzetting van deze ontwikkeling.

Het materiële beleid van de EU

De ruimte van vrijheid, veiligheid en rechtvaardigheid – de samenwerking op het gebied van justitie en binnenlandse zaken. Het grondwettelijk verdrag bevat drie interessante ontwikkelingen op het gebied van de ruimte van vrijheid, veiligheid en rechtvaardigheid: (1) Meer besluiten kunnen met gekwalificeerde meerderheid worden genomen. (2) Er komt een grotere bevoegdheid voor het Hof van Justitie. (3) De derde pijler, met zijn speciale bepalingen ter bescherming van de belangen van de lidstaten, wordt afgeschaft en de werkzaamheden op het gebied van de ruimte krijgen een meer supranationaal karakter. Deze ontwikkelingen zouden de belangrijkste wijziging van de scheidslijnen hebben opgeleverd. Echter dient hierbij te worden aangetekend dat de ruimte van vrijheid, veiligheid en rechtvaardigheid de laatste jaren veel aandacht in de verdragen heeft gekregen. De behoefte van de lidstaten om hun activiteiten op het gebied van grensoverschrijdende justitiële zaken en preventie te coördineren, heeft hierbij een rol gespeeld. In zoverre bevestigen de veranderingen van het grondwettelijk verdrag deze trend, en gaat het niet om een verstrekkende nieuwe ontwikkeling.

Het interne beleid en het externe optreden van de Europese Unie. De belangrijke wijzigingen van het grondwettelijk verdrag op het gebied van het interne beleid en het externe optreden van de EU, zouden geen grote wijzigingen van de status quo onder de bestaande verdragen hebben opgeleverd. Sommige veranderingen zouden de scheidslijnen weliswaar

hebben veranderd, maar over het algemeen gezien zou de impact toch niet groot zijn geweest.

Commentaar en conclusie

Kritiek op de structuur van het grondwettelijk verdrag. Het grondwettelijk verdrag is een document dat aanleiding geeft tot kritiek waar het gaat om zijn structuur en redactie. Het is lang en bevat veel overlappende teksten in de Delen I en III. Deel I geeft een bruikbaar overzicht. Echter is een aantal onderwerpen dat in Deel I is behandeld, ook terug te vinden in Deel III zonder dat verwijzingen zijn aangebracht. Dit is met name het geval voor een aantal institutionele aangelegenheden. De opsomming van nieuwe, vereenvoudigde, juridische instrumenten is in zekere zin een teleurstelling, omdat er ook nog andere wijzen van optreden blijken te bestaan. De behandeling van de problematiek van de mensenrechten – hier valt te denken aan de verwijzing naar het Handvest van de Grondrechten van de EU, het Europese Verdrag voor de Rechten van de Mens, de tradities van de lidstaten en andere internationale verplichtingen - is onnodig gecompliceerd. Het grondwettelijk verdrag had verbeterd kunnen worden door de overlappende onderwerpen samen te voegen en de meer gedetailleerde bepalingen uit het document te verwijderen. Het Hervormingsverdrag biedt in dit verband geen hoop op verbetering ten opzichte van het grondwettelijk verdrag.

Een laatste terugblik - het innemen van een tussenpositie. Veel vernieuwingen van het grondwettelijk verdrag zouden weinig tot geen effect hebben gehad op de scheidslijnen tussen de Europese Unie en de lidstaten. Slechts kleine veranderingen zouden plaatsvinden, met name op het gebied van mensenrechten, de ruimte van vrijheid, veiligheid en rechtvaardigheid, het gemeenschappelijk buitenlands en veiligheidsbeleid en, meer in het algemeen, daar waar gekwalificeerde meerderheid in de plaats zou zijn gekomen voor besluitvorming met unanimiteit in de Raad. Anderzijds zou de positie van de lidstaten ook iets zijn verbeterd. In zijn algemeenheid illustreert het grondwettelijk verdrag en het lot dat dat verdrag uiteindelijk is toegevallen, dat de Europese integratie een punt heeft bereikt waarbij een overdracht van nog meer belangrijke bevoegdheden naar Brussel politiek gezien niet meer wordt geaccepteerd. Hier speelt het verlangen van alle, of bijna alle, lidstaten een rol om hun soevereiniteit op bepaalde essentiële beleidsterreinen te behouden. Onder het grondwettelijk verdrag zou de Europese Unie haar gemengde karakter hebben behouden en een entiteit zijn gebleven die het midden houdt tussen een intergouvernementele organisatie en een klassieke federatie.

Curriculum Vitae of Stephen C. Sieberson

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1. EDUCATION

--Juris Doctor, with distinction, University of Iowa College of Law, Iowa City, Iowa, 1975
--Attended Academy of International Law, The Hague, Summer 1976
--Master of Arts, American Popular Culture, Department of English, Bowling Green State University, Bowling Green, Ohio, 1973
--Bachelor of Arts, English and American Literature, Calvin College, Grand Rapids, Michigan, 1970

2. TEACHING EXPERIENCE

--Assistant Professor of Law, Creighton University School of Law, Omaha, NE, fall 2005 to present
--Fulbright Senior Specialist and Visiting Professor of Law, Institute of International Relations and Approximation of Law, Faculty of Law, Comenius University, Bratislava, Slovak Republic, summer 2006
--Adjunct Professor of Law, University of Tennessee College of Law, Knoxville, TN, summer 2005
--Fulbright Scholar and Visiting Professor of Law, Institute of International Relations and Approximation of Law, Faculty of Law, Comenius University, Bratislava, Slovak Republic, 2004-2005
--Adjunct Professor of Law, University of Oregon School of Law, Eugene, OR, 2003-2004
--Adjunct Professor of Law, University of Washington School of Law, Seattle, WA, 1987-1989, 2000-2002
--Visiting Instructor, Erasmus University Faculty of Law, Rotterdam, Netherlands, 1981-2000, 2003
--Visiting Instructor, University of the Netherlands Antilles, Curaçao, N.A., 2002, 2003
--Visiting Instructor, Institute for Legal Research and Development, Jogjakarta, Indonesia, 1990

3. CONSULAR AND LAW PRACTICE EXPERIENCE

--Honorary Consul for the Netherlands for Washington, Idaho and Montana, 1987-2003
--Private law practice in Seattle, WA, 1976-1979, 1982-2001; in Eugene, OR 2002-2003.
--Legal advisor, ABN Bank, Amsterdam, Netherlands, 1980-1981
--Senior law clerk to United States District Court Judge William T. Beeks, Western District of Washington, Seattle, WA, 1975-76

4. BAR MEMBERSHIPS

--Washington State Bar, Admitted 1975 (active status)
--Oregon State Bar, Admitted 2002 (currently inactive status)